The Hole in the Code: Good Faith and Morality in Chapter 13

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"I'm falling through a hole in the flag!
Help! I'm falling. . . ."[1]

"For what shall it profit a man, if he shall gain
the whole world, and lose his own soul?"[2]

Imagine an area of law defined by a comprehensive statute that courts feel free to defy. Posit a body of legislative history were bent and twisted in the furtherance of judicial interpretations which the plain meaning of the law does not support. Envision a situation in which, although the Supreme Court has signaled its preference that the plain meaning of the statute govern, the courts ignore this judicial guidance.

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1. GEROME RAGNI AND JAMES RADO, HAIR (1966).
2. *Mark* 8:36 (King James).

Imagine judicial interpretations of this statute which express the presiding judges' personal moral values, not any legal principle grounded in the statutory text. Envision a judicial determination that some persons are not entitled to use the law, which on its face, was written for those persons' benefit. Suppose that the courts were to begin to condemn the very act of electing a statute and of complying with its provisions as an "abuse" of the spirit of the statute.

These conditions would be seemingly inconceivable in the United States. Yet the reader who has engaged in this exercise has not invoked *1984*, the Spanish Inquisition, the Jim Crow laws, nor pre-apartheid South Africa. She has envisioned the current status of a particular facet of bankruptcy law in the United States.

A debtor faced with a catastrophic financial situation (e.g., a professional[3] threatened with malpractice liability) may chose to seek protection in bankruptcy. A debtor finds several possible options in the Bankruptcy Code.[4] The Code offers different discharges from indebtedness under chapters 7,[5] 11,[6] and 13[7] of the Code. Nothing explicit in the Code prevents the debtor from choosing the chapter providing her with the most personally beneficial relief. Nothing in the Code prevents this choice or warns of its potential consequences. Should the debtor choose Chapter 13, however, she might find herself sucked through a hole in the Code into a realm of uncertainty and unpredictability in

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3. The analysis in this paper applies to every Chapter 13 case; it is not limited to debtor professionals. The author, however, admits a particular interest in professionals in bankruptcy, because the genesis of the present inquiry was the questions unanswered in a previous article, Bradley M. Elbein, *An Obscure Revolution: The Liabilities of Professionals in Bankruptcy*, 48 S.C.L. Rev. 743 (1997). Here, as in the previous article, the term "professionals" refers to "those who undertake any work calling for special skill, [who] are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 185 (5th ed. 1984) (including attorneys, accountants, physicians, and corporate officers or directors).

4. 11 U.S.C. § 101-1330 (1994).

5. A discharge under Chapter 7 discharges "all debts," subject to exceptions enumerated in § 727(a) (for a global denial of discharge to the debtor) and § 523 (for denial of discharge of a particular claim). *See* 11 U.S.C. § 727(b) (1994).

6. Under Chapter 11, the confirmation of a plan "discharges the debtor from any debt," except those set out in § 523 and § 727(a). 11 U.S.C. § 1141(d)(1)(A) (1994).

7. Under Chapter 13, discharge of debts may be only partial. A debtor is required to submit a plan for payments of her debts, and discharge under § 1328(a) generally occurs only after the plan has been submitted. A complete discharge without satisfaction of the plan may occur when the debtor suffers under some "hardship" defined in § 1328(b). It should be noted that even under Chapter 13, however, some claims are excepted from discharge. *See* 11 U.S.C. § 1328(a) (1994).

which neither she nor her counsel can predict outcomes with any confidence.[8]

This article examines the chapter 13 discharge through its most important element: good faith. Part I explores why Chapter 13 is such an attractive option for debtors. Part II summarizes the eligibility requirements of Chapter 13. Part III examines the cases interpreting good faith and determines that in most of them good faith is the crucial hurdle to a successful Chapter 13.[9] Part IV demonstrates that, for the majority of courts, the "good faith" analysis transcends not only the Code but the whole arena of law. Part V concludes that the courts' interpretations of "good faith" have created a hole in the Code which threatens a complete destruction of codified bankruptcy law.

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8. It would be most fashionable to allude here to Alice in Wonderland as a metaphor for the descent from the smooth pattern of legal logic into unpredictable nonsense. In fact, a recent Westlaw search showed that more than 347 articles had alluded to Lewis Carroll's famous works (actually entitled *Alice's Adventures in Wonderland* and *Through the Looking Glass*). These articles were written about subjects as diverse as human rights (Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 IND. L.J. 673 (1996)), corporate governance (Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996)), and bankruptcy (Thomas J. Salerno, *The Continuing Saga of the Statute of Limitations Dilemma Under the Pre- and Post-1994 Amendments to Section 546*, 15 AM. BANKR. INS. J. 36 (1996)), to name only a few.

The allusion to Alice in Wonderland is inapposite despite the insistence of certain critics of the legal profession that lay people are precisely like innocent children who find themselves following a strangely muttering animal down a dark hole into an absurd landscape. An allusion to Alice in Wonderland would miss key characteristics of a debtor's experience in Chapter 13. Alice, for instance, acted intentionally in both following the rabbit and in leaving her accustomed world behind. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1867). The closer metaphor is Dorothy in T*he Wizard of Oz*, who was sucked into Oz by a force she could not control and could not foresee. Moreover, Dorothy's situation, not Alice's, is most similar to that of the debtor who finds that she has fallen into the "good faith" vortex of chapter 13. "She was awakened by a shock, so sudden and severe that if Dorothy had not been lying on the soft bed she might have been hurt. As it was, the jar made her catch her breath and wonder what had happened. . . ." L. FRANK BAUM, THE WIZARD OF OZ 7 (1944).

9. An electronic data search created a corpus of 738 cases, from 1979 through 1996, interpreting "good faith" in Chapter 13. The author based the analysis in this Article on a review of approximately 200 of these cases, selected by a refinement of the search, as well as on the articles and authorities cited below.

I. A CHOICE, AN OPPORTUNITY AND A HOLE IN THE CODE

As a debtor and her counsel examine the Code, it becomes evident to them that the differences in the discharge of debt offered in the three chapters can be significant. There are sound reasons of strategy to choose between the discharges available in chapters 7 and 13.[10] A debtor who may file for protection under either chapter might choose, for strategic reasons, to file first under chapter 7:

> The filing of the chapter 7 case in the first instance may involve a question of strategy as well as debtor motivation. The needs of the debtor and the debtor's family may make such a course desirable. There may be doubt whether anyone would file objections to discharge or complaints to determine dischargeability. If no objections to discharge or no complaints to determine dischargeability are filed, the debtor might secure adequate relief without filing a chapter 13 case. The debtor may believe that the debtor can redeem the collateral and work out an acceptable program of payments voluntarily with the secured creditors. If this turns out successfully, the debtor could achieve the benefits of an installment payment program with the secured creditors, without payment to unsecured creditors and without payment of the chapter 13 trustee's fees. If the calculations of the debtor and counsel go awry, the chapter 7 case can always be converted to chapter 13 case. The fall back position of chapter 13 is not lost by the original filing of a chapter 7 case, especially since the right to convert is absolute.[11]

A debtor, alternatively, may wish to file initially under chapter 13, or to convert from a chapter 7 to a chapter 13, for any of the following reasons:

> [T]he existence of one or more claims excepted from the operation of a chapter 7 discharge; the desire of the debtor to redeem collateral, and the inability to do so in a lump sum payment; existence of nonexempt property which the debtor desires to retain; the unavailability of a chapter 7 discharge; or the need to protect a codebtor. In any of these or similar situations, a conversion motion can be filed converting the [chapter 7] case to one under chapter 13.[12]

These are all legitimate strategic reasons and none are considerations prohibited by the explicit language of the Code.

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10. This paper does not address the discharge available under Chapter 11. Of the numerous debtors eligible under either Chapter 13 or Chapter 11, many choose Chapter 13 over Chapter 11 because of the cost and complexity of discharge under Chapter 11. Moreover, Chapter 11 does not offer the breadth of discharge offered by Chapter 13. For debtors concerned with a discharge, the choice must be between Chapter 7 and Chapter 13.

11. 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶101.08 at 101-27, 101-28 (Lawrence P. King, et al. eds., 15th ed. 1996) [hereinafter COLLIER BANKRUPTCY PRACTICE GUIDE].

12. *Id.* at 101-27.

The strategic choice between the two chapters may depend on one issue: dischargeability. Some claims are dischargeable under some chapters while non-dischargeable[13] under others. Chapter 7 contains a large number of exceptions to discharge while Chapter 13 contains only a few. Thus, claims arising from wilful misconduct, fraud or defalcation (all nondischargeable under Chapter 7) may be discharged in Chapter 13. For this reason, Chapter 13 provides a safe haven for debtors who would otherwise be faced with liability that would survive the bankruptcy discharge.

This haven, however, has a dark secret. To successfully obtain a discharge of indebtedness through Chapter 13, the debtor must meet several statutory requirements. Among these statutory requirements is "good faith."[14] Neither the Code nor the legislative history defines good faith. Furthermore, the cases in which bankruptcy courts have assessed good faith fail to fall into any pattern which would allow the practitioner or her client to determine whether a debtor will survive the good faith inquiry. "Good faith," in fact, takes the debtor from the safe world of commercial and bankruptcy law, in which predictability is valued above all things,[15] and expels her into an unpredictable void, in which purity of heart,[16] not compliance with the Code, is what matters.

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13. This article uses the technically incorrect terms "dischargeable" and "nondischargeable" to refer to two types of claims under discussion throughout. On the one hand, there are claims which are not exceptional, that is, which do not rise above the undifferentiated mass of other debts from which the debtor seeks protection. These claims are discharged along with other debt under the general rule that all unexceptional liabilities are discharged. I call these claims "dischargeable," although technically it is the corpus of claims which are dischargeable, not any one claim. On the other hand, there are claims which are exceptional: they either rise above the mass of other claims to receive an exception to discharge under § 523 or § 727(b), or form the basis for an objection to discharge under § 727(c)(1). I refer to these exceptional claims as "nondischargeable" or as "surviving bankruptcy." Faced with the choice of using the technically correct terms "not excepted from discharge" and "subject to exception from discharge" or "forming the basis for an objection to discharge" along with a series of section numbers, or the less correct but more easily digested terms "dischargeable" and "nondischargeable," I opted for readability.

14. 11 U.S.C. § 1325(a)(3) (1994).

15. *See* discussion *infra* Part IV.C., p. 485.

16. *See* discussion *infra* Part IV.A., p. 473.

II. CHAPTER 13 REQUIREMENTS

Chapter 13 offers real opportunity for relief through the expanded discharge it makes available. In order to take advantage of this opportunity, however, the debtor must first meet eligibility requirements. In addition, after meeting the eligibility requirements, the debtor must propose a plan which qualifies under the statute.

This article argues that the "good faith" requirement of Chapter 13 is the pivotal issue. To provide the context for the analysis of the courts' use of "good faith," it is helpful to sketch out the chapter's provisions. Part II of this article examines the breadth of Chapter 13 discharge, the requirements for a debtor to qualify under the chapter, and the statutory requirements for a Chapter 13 plan.

A. The Chapter 13 Super-Discharge

The Chapter 13 discharge is often referred to as a super-discharge because it allows the discharge of liability for acts which are *not* dischargeable under Chapter 7.[17] Under Chapter 7, claims for fraud or defalcation[18] are not dischargeable; nor are claims arising from willful or malicious acts by the debtor.[19] Most claims for professional malpractice fall into one or more of these categories; therefore, a debtor professional cannot be certain of a discharge of malpractice liabilities under Chapter 7.

Chapter 13 presents a marked contrast. Claiming Chapter 13 protection allows the debtor to discharge some claims which cannot be discharged under Chapter 7. Although section 523 includes a long list of claims excepted from discharge (particularly subsections 523(a)(4) and 523(a)(6)),[20] which apply to discharges granted both under Chapter 7[21] and under the Chapter 13 hardship discharge,[22] with only a few

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17. *See, e.g., In re* Belt, 106 B.R. 553 (Bankr. N.D. Ind. 1989).
18. 11 U.S.C. § 523(a)(4) (1996).
19. 11 U.S.C. § 523(a)(6) (1996).
20. 11 U.S.C. § 523(a)(4) (1994) excepts from discharge debts arising from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," while 11 U.S.C. § 523(a)(6) (1994) excepts debts "for willful and malicious injury by the debtor to another entity or to the property of another entity."
21. 11 U.S.C. § 727 (1994).
22. 11 U.S.C. § 1328(b) (1994) provides a discharge without complete payment under the confirmed plan, provided that the circumstances which prevent completion are beyond the debtor's control. The subsection is fairly detailed and needs careful examination by a debtor who wishes to invoke it. Should a debtor seek a hardship discharge, she will find that the liability that was nondischargeable in Chapter 7, but dischargeable under § 1325(a), becomes *nondischargeable* again through § 1328(c)(2).

exceptions, the claims nondischargeable under Chapter 7 are dischargeable under the main discharge provision of Chapter 13, § 1328(a).[23]

> [This section] provides that as soon as practicable after the completion by the debtor of all payments under the plan, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502, except the following: certain long-term debts described in section 1322(b)(5); alimony and child support debts specified in section 523(a)(5); debts, as specified in section 523(a)(8), for educational loans, benefit overpayments and obligations to repay funds received as an educational benefit, scholarship or stipend; debts, as excepted from discharge under section 523(a)(9), arising from any death or personal injury caused by a debtor's use of alcohol, drugs or other substances while operating a motor vehicle; and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime.[24]

Thus, claims for subsection 523(a)(4) and 523(a)(6) liabilities, including professional malpractice liabilities, may not be discharged under Chapter 7. These claims, however, may be dischargeable under Chapter 13 because they are not included in the list of claims excepted by the exceptions to discharge. If the literal words of the statute are followed, Chapter 13 allows the discharge of most of the liabilities which would not be dischargeable under other chapters of the Code.

B. Requirements for the Debtor

To earn the expansive discharge of Chapter 13, the debtor must qualify under the statutory requirements of the chapter. The primary limiting factor is the restrictive monetary limitation of section 109(e).[25]

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23. 11 U.S.C. § 1328(a) provides that the court shall grant the debtor a discharge of all debts except those provided for under §§ 1322(b)(5) (payments curing a default), 523(a)(5) (spousal and child support), 523(a)(8) (student loans), 523(a)(9) (death or personal injury resulting from drunk driving), 523(a)(13) (restitution), or 523(a)(7) (a criminal fine).

24. COLLIER BANKRUPTCY PRACTICE GUIDE, *supra* note 11, ¶ 101.04[2], at 101-14, 101-15.

25. The debtor must owe, on the date of filing, less than $250,000 of non-contingent, liquidated and unsecured debt, and less than $750,000 of non-contingent, liquidated and secured debt. 11 U.S.C. § 109(e) (1994). This section should be considered along with § 502(c), which provides a mechanism for estimating contingent, unliquidated claims. One way for a creditor to challenge a Chapter 13 claim is to eschew the "good faith" attack considered in the text, and instead, show that the debtor's debts exceed the debt ceiling. If successful, the creditor could force the debtor to convert to a Chapter 7 or to file a Chapter 11, neither of which provide the broad discharge which protect a debtor from "nondischargeable" liability.

Although recent amendments raised the ceiling amounts,[26] these monetary limitations may still prevent some debtors, particularly professionals, from using this chapter. The debts which are included in these limits are only noncontingent and liquidated.[27] Cases debate at great length the precise meaning of these terms.[28] If a debt is "liquidated,"[29] it must be included in the calculation[30] if it is also noncontingent. If a debt is "noncontingent"[31] it may be included if it is also liquidated. Courts are unwilling to find a debt to be noncontingent when the liability has not been determined prior to filing for bankruptcy.[32] Significantly for professionals seeking relief from malpractice liability, one commentator has stated that a pending tort claim is contingent and therefore does not count toward the debt that the professional has to squeeze in under the statutory ceiling.[33] Whether the debtor disputes the claim, as is likely with professional malpractice claims, is not relevant to the statutory ceiling calculation.[34] There is significance, however, if debtor admits readily ascertainable claims.[35]

There are other eligibility requirements, not as important for purposes of this paper, including a limitation on prior bankruptcy filings,[36] citizenship[37] and a regular income.[38] None of these requirements,

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26. Pub. L. 103-394 § 108(a) raised the ceiling amounts from $100,000 and $350,000 to $250,000 and $750,000 respectively. 11 U.S.C. § 109(e) (1994).

27. 11 U.S.C. § 109(e) (1994).

28. *See generally*, COLLIER BANKRUPTCY PRACTICE GUIDE, *supra* note 11, ¶ 101.03, at 101-8, 101-9.

29. Federal Deposit Ins. Corp. v. Wenberg (*In re* Wenberg), 94 B.R. 631 (9th Cir. BAP 1988), *aff'd* 902 F.2d 768 (9th Cir. 1988).

30. *See In re* McGovern, 122 B.R. 712 (Bankr. N.D. Ind. 1989).

31. *See generally* COLLIER BANKRUPTCY PRACTICE GUIDE, *supra* note 11, ¶109.05.

32. *See, e.g., In re* Ramus, 37 B.R. 723 (Bankr. N.D. Ga. 1984); *In re* Belt, 106 B.R. 553 (Bankr. N.D. Ind. 1989).

33. COLLIER BANKRUPTCY PRACTICE GUIDE, *supra* note 11, ¶ 109.05.

34. *See In re* Jerome, 112 B.R. 563 (Bankr. S.D. N.Y. 1990) (holding that, for the purpose of determining Chapter 13 eligibility, a dispute regarding liability or amount of a claim does not cause debt to be regarded as unliquidated).

35. *See In re* Ramus, 37 B.R. 723 (Bankr. N.D. Ga. 1984) (holding the amount was ascertainable when the debtor admitted the tort.)

36. *See* COLLIER BANKRUPTCY PRACTICE GUIDE, *supra* note 11, ¶101.03(a), at 101-9.

> To deal with the problem of repetitive, abusive filings, the Code provides that no individual may be a debtor under any chapter of the Bankruptcy Code who has been a debtor in a case pending under the Bankruptcy Code at any time within the preceding 180 days if: (1) the case was dismissed by the court for failure of the debtor to bide by orders of the court, or to appear before the court in proper prosecution of the case; or (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of the Code.

Id.

37. 11 U.S.C. § 109(a) (1994).

however, are as significant and as likely to disqualify a debtor from Chapter 13 relief as is the debt ceiling.

C. Requirements for the Chapter 13 Plan

After meeting these eligibility requirements, the debtor must then propose a plan which meets a different set of statutory requirements. The requirements for the Chapter 13 plan are set out in the subsections of § 1325(a). Five of these requirements are almost trivial; two are administrative (that the debtor have paid any fees required to be paid,[39] and that the plan comply with provisions of the statute[40]); one is common sense (that she be able to fulfill her plan),[41] one sets a benchmark for payments to creditors,[42] and one has to do with acceptance of the plan by creditors.[43]

The sixth subsection contains the key requirement of Chapter 13. Section 1325(a)(3) provides that "the court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law."[44] This subsection contains three requirements for the plan itself: that there first be a plan, that it be proposed in good

38. *Id.*
39. 11 U.S.C. § 1325(a)(2) (1994).
40. 11 U.S.C. § 1325(a)(1) (1994).
41. 11 U.S.C. § 1325(a)(6) (1994). My colleague Larry Teiger argues that the question of plan "feasibility" embodied in this section is indeed far from trivial. He suggests that the failure to meet the "feasibility" requirement stops a huge number of plans.
42. 11 U.S.C. § 1325(a)(4) (1994).
43. 11 U.S.C. § 1325(a)(5) (1994) (relating to treatment of secured claims). *See also* 11 U.S.C. § 1325(b)(1) (1994) (regarding objections relating to unsecured claims).
44. 11 U.S.C. § 1325(a)(3) (1994).

faith,[45] and that it not be proposed by any means forbidden by law.[46] This subsection stakes out the real battleground for Chapter 13.

All of the requirements other than those of § 1325(a)(3) are objectively ascertainable. Either a creditor objects to the plan or she does not; either fees have been paid or they have not; either the debtor can comply with the plan or she cannot. Good faith, however, is subjective: subjective both in the sense that it inquires into the debtor's subjective intention, and that it invites the judge to bring her own subjective determination to bear. Herein lies the fundamental problem with Chapter 13.

III. GOOD FAITH

Of the various statutory and judicial requirements for a Chapter 13 plan, the great weight of the determination rests on the question of whether the plan was proposed in good faith as required by § 1325(a)(3). According to one writer, "[t]he controversy concerning the chapter 13 'good faith' test has resulted in more litigation than any other issue to arise since the enactment of the Bankruptcy Code."[47] This section has been interpreted as a policing mechanism to ensure that claims under Chapter 13 serve to accomplish only the aims and objectives of bankruptcy philosophy and not any other purpose.[48] The majority of courts aggressively use "good faith" to patrol the Code, but the results of this policing are far from law or order.

In this section, I examine the corpus of cases interpreting the "good faith" requirement. I begin by exploring the courts' duty to investigate

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45. Only the plan, not the bankruptcy itself, must be filed in good faith. 11 U.S.C. § 1325(a)(3) (1994). *See In re* Siciliano, 167 B.R. 999 (Bankr. E.D. Pa. 1994), *In re* Flick, 14 B.R. 912 (Bankr. E.D. Pa. 1981). However, many courts now import into Chapter 13 a good faith filing requirement, which cannot be found in the text. *See In re* Love, 957 F.2d 1350 (7th Cir. 1992); *In re* Standfield, 152 B.R. 52 (Bankr. N.D. Ill. 1993); *In re* Ristic, 142 B.R. 856 (Bankr. E.D. Wis. 1992). Moreover, as noted in the text below, the majority of cases interpreting good faith conduct an examination of the way in which the debtor's debts arose, *e.g., In re* Smith, 848 F.2d 813 (7th Cir. 1988), or of the totality of circumstances confronting the debtor, *e.g.*, Metro Employees Credit Union v. Okoreeh-Baah (*In re* Okoreeh-Baah), 836 F.2d 1030 (6th Cir. 1988)).

46. The meaning of the clause "not by any means forbidden" is not clear. A diligent review of the relevant cases revealed no case interpreting this clause. As the author has noted elsewhere, a vague or ill-defined term in the Code seems to invite creative development of the law. *See* Elbein, *supra* note 3. This phrase would, therefore, seem to be fertile ground for judicial improvisation.

47. Conrad K. Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis And Proposal For Change*, 55 AM. BANKR. L.J. 271, 273 (1981) (citing 53 cases through 1981). An additional approximately 700 "good faith" cases followed during the next 15 years from 1981 until 1996. *See supra* note 9.

48. *In re* Chase, 43 B.R. 739 (D. Md. 1984).

good faith and the debtor's duty to carry her burden of proof on the issue. I then attempt to define the phrase, "good faith." The section concludes with an analysis of the factors used by courts to determine whether the "good faith" requirement has been satisfied.

A. The Court's Duty

The bankruptcy court must exercise an independent duty to determine whether the plan is confirmable, and whether or not a creditor objects to the plan.[49] The court's duty is "independent" of action by any other party.[50] This judicial determination considers not only whether the statutory requirements have been fulfilled, but also whether the plan is proposed in good faith.[51] The good faith finding must be a separate and specific finding.[52] A specific finding by the court is required irrespective of whether an objection to the plan is lodged.[53]

B. The Burden of Proof

The court may have an independent duty to review the plan, but the burden of proof falls on the debtor who proposes it.[54] This can be a heavy burden,[55] its weight perhaps depending on the extent of the creditor's claims.[56] For some courts, the debtor has no burden beyond showing that the plan was proposed in good faith.[57] Even if a party in

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49. *In re* Gurst, 76 B.R. 985 (Bankr. E.D. Pa. 1987).
50. *In re* Harris, 62 B.R. 391 (Bankr. E.D. Mich. 1986); *In re* Bowles, 48 B.R. 502 (Bankr. E.D. Va. 1985).
51. *In re* Belt, 106 B.R. 553 (Bankr. N.D. Ind. 1989) (emphasizing that the court's inquiry should focus on whether the plan abuses Chapter 13's provisions, purpose or spirit).
52. Fidelity & Cas. Co. of N.Y. v. Warren (*In re* Warren), 89 B.R. 87 (9th Cir. BAP 1988); Johnson v. Vanguard Holding Corp. (*In re* Johnson), 708 F.2d 865 (2nd Cir. 1983).
53. *In re* Hartdegen, 67 B.R. 230 (Bankr. N.D. Ala. 1986).
54. Hardin v. Caldwell (*In re* Caldwell), 895 F.2d 1123 (6th Cir. 1990); *In re* Elisade, 172 B.R. 996 (Bankr. M.D. Fla. 1994); *In re* Standfield, 152 B.R. 528 (Bankr. N.D. Ill. 1993); *In re* Lewis, 170 B.R. 861 (Bankr. D. Md. 1994); *In re* Humphrey, 165 B.R. 508 (Bankr. M.D. Fla. 1994); *In re* Lessman, 159 B.R. 135 (Bankr. S.D.N.Y. 1993); *In re* Sullivan, 40 B.R. 914 (Bankr. E.D.N.Y. 1984); *In re* Smith, 39 B.R. 57 (Bankr. S.D. Fla. 1984).
55. *In re* Farmer, 186 B.R. 781 (Bankr. D.R.I. 1995).
56. *In re* Warren, 89 B.R. 87 (9th Cir. BAP 1988); *In re* Norman, 162 B.R. 581 (Bankr. M.D. Fla. 1993). *See also In re* Farmer, 186 B.R. 781 (Bankr. D.R.I. 1995).
57. *In re* Hines, 723 F.2d 333 (3rd Cir. 1983).

interest files an objection, the debtor still has to prove her eligibility for Chapter 13 relief,[58] although the objector must carry his own burden of proof on the objection.[59]

The debtor walks a narrow path. If the plan is confirmable, confirmation is mandatory[60] even if there are objections (as long as objections are overcome).[61] Yet, even if the debtor complies with the express provisions of the law, she may be denied confirmation of a plan if the spirit of the law has been violated. Thus, even if all tests for approval of a Chapter 13 plan are met, a plan confirmation may be denied if there is a perceived abuse of the provisions, purpose or spirit of Chapter 13,[62] or if the bankruptcy petition is filed in order to perpetrate a fraud.[63] The license for this elevation of spirit over statute rests on two words: "good faith."

C. Good Faith

What is "good faith?" The Code does not define it.[64] Courts acknowledge that the concept is amorphous.[65] Most courts reach the conclusion that a debtor's good faith is to be judged by the totality of the circumstances,[66] even though this standard leaves "good faith" with

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58. Tillman v. Lombard, 156 B.R. 156 (E.D. Va. 1993).

59. *In re* Sitarz, 150 B.R. 710 (Bankr. D. Minn. 1993); *In re* Cruz, 75 B.R. 56 (D. P. R. 1987).

60. Benevides v. Alexander (*In re* Alexander), 670 F.2d 885 (9th Cir. 1982).

61. *In re* Fizer, 1 B.R. 400 (Bankr. S.D. Ohio 1979).

62. *In re* Belt, 106 B.R. 553 (Bankr. N.D. Ind. 1989); *In re* Kern, 40 B.R. 26 (Bankr. S.D.N.Y. 1984).

63. *In re* Norman, 162 B.R. 581 (Bankr. M.D. Fla. 1993) (determining that debtor coordinated his late filings of federal tax returns and Chapter 13 petition in order to perpetrate a fraud on the U.S. Government).

64. It would be unfair to allege that the Code defines nothing useful. Section 101 is replete with useful definitions, such as "accountant," "attorney," and "United States." Because "good faith" is so critical to the success of a Chapter 13 plan, however, the drafters might have provided some guidance on this phrase. Any guidance, no matter how ineffectual, might have assisted the courts in interpreting this section, and prevented the chaos that Part V discusses.

65. *See, e.g.*, St. Luke Parish Fed. Credit Union v. Wourms, 14 B.R. 169 (Bankr. S.D. Ohio 1981).

66. *See, e.g.*, State of Ohio, Student Loan Comm'n v. Doersam (*In re* Doersam), 849 F.2d 237 (6th Cir. 1988); Spokane Ry. Credit Union v. Gonzales (*In re* Gonzales), 172 B.R. 320 (E.D. Wash. 1994); *In re* Solomon, 166 B.R. 832 (Bankr. Md. 1994), *aff'd* 173 B.R. 325 (D.Md. 1994), *rev'd* 67 F.3d 1128 (4th Cir. 1995); *In re* Oglesby, 158 B.R. 602 (E.D. Pa. 1993), *on remand* 161 B.R. 917 (Bankr. E.D. Pa. 1993); *In re* Huerta, 137 B.R. 356 (Bankr. C.D. Cal. 1992); *In re* Reyes, 106 B.R. 155 (Bankr. N.D. Ill. 1989); Fidelity & Cas. Co. of N.Y. v. Warren (*In re* Warren), 89 B.R. 87 (B.A.P. 9th Cir. 1988); Downey Sav. & Loan Ass'n v. Metz (*In re* Metz), 67 B.R. 462 (B.A.P. 9th Cir. 1986), *aff'd* 820 F.2d 1495 (9th Cir. 1987); *In re* Sellers, 33 B.R. 854 (Bankr. D. Colo. 1983); *In re* Wilheim, 29 B.R. 912 (Bankr. D.N.J. 1983); *In re* Tauscher, 26 B.R.

no semantic content at all.[67] By not having a precise definition, the practitioner and the courts must search for guidance as to how to satisfy the requirement.

The phrase "good faith" is not uncommon in other areas of commercial law. A practitioner might reasonably expect some elucidation in Chapter 11 of the Bankruptcy Code, or in the Uniform Commercial Code (UCC). Some courts helpfully suggest that the good faith referenced in Chapter 13 must be identical to the good faith required in Chapter 11 reorganizations.[68] Ultimately, however, the good faith requirement in Chapter 11 functions merely as a shorthand authorization for the bankruptcy courts to police their own jurisdiction.[69] In the words of one court, "[g]ood faith . . . is merged into the power of the court to protect its jurisdictional integrity from schemes of improper petitioners seeking to circumvent jurisdictional restrictions and from petitioners with demonstrable frivolous purposes absent any economic reality."[70] That the term should resist elucidation throughout the Code is not surprising because the same corpus of judges interpret Chapter 11 and Chapter 13.[71]

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99 (Bankr. E.D. Wis. 1982). *See also* cases cited *infra* note 79.

67. To put this in plain language without lapsing into semiotics: the "totality of the circumstances" is a completely unbounded set of factors, in essence an infinite set. By saying that "good faith" signifies the examination of the totality of the circumstances, we say that good faith refers to that infinite set. If the "meaning" of a concept is an infinite set of possibilities, then the concept has no exclusive meaning. Yet a "meaning" by definition must be more or less exclusive (at least, exclusive enough to define what a "meaning" does not mean). When the signifier signifies a non-exclusive set of signifieds, then the larger the set of possible signifieds, the more "vague" the signifier is. When the set of signifieds is infinitely large (e.g., when "good faith" means the "totality of the circumstances"), the signifier (good faith), refers to everything and therefore means nothing. To a semiotician, it would be clear that this is the reason that courts can fill the empty concept of "good faith" with any content they desire; to a lawyer, this does not assist in determining how to satisfy the good faith requirement.

68. *In re* Schaitz, 913 F.2d 452 (7th Cir. 1990); *In re* Wiggles, 7 B.R. 373 (Bankr. N.D. Ga. 1980).

69. *See* Brian S. Katz, *Single-Asset Real Estate Cases and the Good Faith Requirement: Why Reluctance to Ask Whether a Case Belongs in Bankruptcy May Lead to the Incorrect Result*, 9 BANKR. DEV. J. 77 (1992); *see also* Note, *Good Faith and Chapter 13 Discharge: How Much Discretion is Too Much?*, 11 CARDOZO L. REV. 657 (1989).

70. *In re* Johns-Manville Corp., 36 Bankr. 727, 737 (Bankr. S.D.N.Y. 1984) (quoting *In re* N.W. Recreational Activities, Inc., 4 B.R. 36, 39 (Bankr. N.D. Ga. 1980)).

71. This is not surprising in human terms: judges are as bedeviled by apparent inconsistency as are the rest of us. But is this not a foolish consistency given the

The UCC promises to be more helpful. The commercial code defines good faith twice: once in its definitions section[72] and once in the Sales article.[73] The term appears in more than fifty other sections of the Commercial Code. Some commentators have managed to glean general rules about its meaning:

> The Code employs two standards of good faith. Section 1-201(19) states the generally applicable "subjective" ("white heart and empty head") standard which concentrates on the actual state of mind of the party rather than on the state of mind a reasonable man would have had under the same circumstances. Thus, the section defines good faith as "honesty in fact in the conduct or transaction concerned." In the case of merchants, however, or at least those merchants governed by Article 2 on Sales, an objective element is added to their good faith duties. Section 2-103(1)(b) provides that "[g]ood faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." This definition imposes a duty on merchants to meet good faith requirements that are measured both subjectively and objectively.[74]

If the reader does not see how these abstract definitions apply to our Chapter 13 problem, she is not alone. One bankruptcy scholar, having reviewed the UCC in the forlorn hope of finding assistance, laments that "[g]ood faith is one of the least specific standards in the law today. Even outside of bankruptcy, contracts scholars have long debated what good faith means."[75] Her summary of the debate proves that years of

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different contexts of the two chapters? In Chapter 11, if the reorganization is to succeed, the debtor and creditor must continue to have a commercial relationship. Such a relationship might be said to require honesty of intention in the future, of the kind required between the parties in a commercial contract. For this reason, a kind of *transactional good faith* is required in Chapter 11. But in a Chapter 13 action, once the plan is approved the transaction is over. The debtor and creditor need have no future relationship. Instead, the creditor, if he is to have any continuing relationship, has one with the court. The only point at which the debtor's good faith intentions for the future are relevant to the creditor is during the proposal of the plan. For that reason, one would think that in Chapter 13 the courts would focus on what might be called *propositional good faith*: i.e., the question of whether the plan has been proposed with the honest intent to execute it. As noted below, however, the majority of courts neither recognize a difference in contexts nor limit themselves to propositional (or "plan") good faith.

72. U.C.C. § 1-201(19) (1995) (stating that "'[g]ood faith' means honesty in fact in the conduct or transaction concerned.").

73. U.C.C. § 2-103(1)(b) (1995) (providing that "'[g]ood faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.").

74. WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES, § 1-203:01 (1995).

75. Janet A. Flaccus, *Have Eight Circuits Shorted? Good Faith and Chapter 11 Bankruptcy Petitions*, 67 AM. BANKR. L.J. 401, 436 (1993).

dispute have produced much paper and no resolution.[76] Ultimately, there is little help to be found in the Commercial Code.

D. Factors in Evaluating the Debtor's Good Faith

Because the Bankruptcy Code does not provide a definition of good faith, the practitioner and the courts have had to attempt to discern a pattern among the cases interpreting the phrase. Courts have been generous in setting out the factors which they use to measure the debtor's conduct against the good faith standard. Sometimes courts simplify the factors into one loose principle: the debtor need not satisfy all of the factors set out in the various opinions as long as the plan is proposed with a legitimate purpose by debtors who have a reasonable hope of reorganizing.[77] More commonly, however, the cases set out a

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76. Professor Flaccus, tracing the outlines of the debate in footnote 264 of her excellent article, refers to:

> Robert S. Summers, *"Good Faith" In General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) (arguing that the only way to define good faith is to see what conduct it excludes, i.e. "Bad faith," *Id.* at 199-207, and even "bad faith" is difficult to pin down. *Id.*). Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform In Good Faith*, 94 HARV. L. REV. 369 (1980) (argues that good faith can be defined by using certain economic principles; the party exercising discretion performs in good faith when it exercises discretion for any purpose within the contemplation of the parties), Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) (disagrees with Professor Burton); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984) (argues that Summers has not convincingly criticized Burton's contribution); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981) (argues that good faith is a doctrine that deters opportunism and this helps to give it definition).

Id. at 436, n.264. *See also* E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); *accord* Mark Snyderman, Comment, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335 (1988).

77. *In re* Hope, 184 B.R. 590 (Bankr. N.D. Ala. 1995).

laundry list of factors.[78] The majority of courts agree on the following factors:

1. amount of proposed plan;
2. amount of debtor's surplus;
3. debtor's ability to earn;
4. probable duration of plan;
5. accuracy of plan's statements;
6. extent of preferential treatment between classes of creditors;
7. extent to which secured claims are modified;
8. type of debt to be discharged;
9. whether any discharged debt is nondischargeable in Chapter 7;
10. existence of special circumstances such as inordinate medical expenses;
11. frequency with which debtor has sought bankruptcy relief;
12. motivation and sincerity of debtor;
13. burden which plan's administration would place upon trustee.[79]

Other courts vary the list slightly, adding or substituting factors such as:

14. debtor's honesty in representing facts;[80]
15. amount of attorneys fees;[81]
16. living expenses of debtor and dependents;[82]
17. legal and equitable effect of proposed plan.[83]

Neither list is prescriptive: a debtor may find a court uninterested in many of these factors. Yet neither list is exclusive either, because there may be other dispositive factors.[84] The reality is that the courts will announce the factors they intend to consider and then make conclusory determinations whether or not a plan has been proposed in good faith without explicitly weighing the results of their inquiries.

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78. Robinson v. Tenantry (*In re* Robinson), 987 F.2d 665 (10th Cir. 1993); Soc'y Nat'l Bank v. Barrett (*In re* Barrett), 964 F.2d 588 (6th Cir. 1992) (listing also the factors of amount of attorney's fees and debtor's living expenses); State of Ohio, Student Loan Comm'n v. Doersam (*In re* Doersam), 849 F.2d 237 (6th Cir. 1988) (adding debtor's sincerity, motivations, degree of effort and ability to earn).

79. *In re* Doersam, 849 F.2d 237 (6th Cir. 1988); Flygare v. Boulden, 709 F.2d 1344 (10th Cir. 1983); Kitchens v. Georgia Ry. Bank & Trust Co. (*In re* Kitchens), 702 F.2d 885 (11th Cir. 1983); United States v. Estus (*In re* Estus), 695 F.2d 311 (8th Cir. 1982); Fidelity & Cas. Co. of N.Y. v. Warren (*In re* Warren), 89 B.R. 87 (B.A.P. 9th Cir. 1988). *See also In re* Iacovoni, 2 B.R. 256 (Bankr. C. D. Utah 1980).

80. *In re* Oliver, 186 B.R. 403 (Bankr. E.D. Va. 1995).

81. *In re* Wilson, 168 B.R. 260, 262 (Bankr. N.D. Fla. 1994).

82. *Id.*

83. *In re* Whipple, 138 B.R. 137 (Bankr. S.D. Ga. 1991).

84. *In re* Tobiason, 185 B.R. 59 (Bankr. D. Neb. 1995); *In re* Kitchens, 702 F.2d 885 (11th Cir. 1983).

Some courts focus their "good faith" analysis on other issues. The court might rely on the length or duration of a Chapter 13 plan in its decision.[85] Another court might look at whether the debtor has allocated a "sufficient" portion of her income to payments under a plan.[86] In determining allocation, however, the court may only consider allocation under limited circumstances.[87] A court might focus only on the sufficiency of payments to unsecured creditors. Some courts require some payment to unsecured creditors to satisfy the "good faith" requirement.[88] Other courts require no such payment,[89] or focus on the percentage of payment as the dispositive factor.[90]

At first glance these opinions seem to be scattered randomly about the landscape. But they are not as disparate as they appear. They naturally cluster into two distinct approaches to the good faith requirement. The cases utilizing one approach conduct the good faith inquiry as an investigation strictly into the debtor's conduct in proposing a plan. I

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85. Hardin v. Caldwell (*In re* Caldwell), 895 F.2d 1123, 1127 (6th Cir. 1990); *In re* Smith, 130 B.R. 102, 105 (Bankr. D. Utah 1991). *See also In re* Tobiason, 185 B.R. 59, 63, 64 (Bankr. D. Neb. 1995); *In re* Green, 169 B.R. 480, 483 (Bankr. S.D. Ga. 1994); *In re* Baker, 129 B.R. 127 (Bankr. W.D. Tex. 1991); *In re* Carpico, 117 B.R. 335, 336, 337 (Bankr. S.D. Ohio 1990); *In re* Jackson, 91 B.R. 473 (Bankr. N.D. Ill. 1988); *In re* Rogers, 65 B.R. 1018 (Bankr. E.D. Mich. 1986) (illustrating that a court took offense to a debtor's extension of his plan long enough to pay off his sports car, but not long enough to pay off unsecured creditors).

86. *In re* Adamu, 82 B.R. 128 (Bankr. D. Or. 1988) (holding that allocation of income to plan was sufficient where all of disposable income went to payments of creditors); *In re* Curry, 77 B.R. 969 (Bankr. S.D. Fla. 1987) (determining that allocation of income was not sufficient where debtor, a minister, made charitable contributions to church of 50% of his income); *In re* Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986) (finding that allocation wasn't sufficient because debtors did not make any effort to reduce their standard of living in order to maximize the plan distributions). *See also infra* note 147.

87. *In re* Stein, 91 B.R. 796, 802, 803 (Bankr. S.D. Ohio 1988).

88. Tenny v. Terry (*In re* Terry), 630 F.2d 634 (8th Cir. 1980); *In re* Saglio, 153 B.R. 4 (Bankr. D.R.I. 1993); *In re* Lindsey, 122 B.R. 157 (Bankr. M.D. Fla. 1991); *In re* Lattimore, 69 B.R. 622 (Bankr. E.D. Tenn. 1987); *In re* Smith, 39 B.R. 57 (Bankr. S.D. Fla. 1984); *In re* Wojick, 10 B.R. 328 (Bankr. D. Conn. 1981); *In re* Iacovoni, 2 B.R. 256 (Bankr. D. Utah 1980); *In re* Hobday, 4 B.R. 417 (Bankr. N.D. Ohio 1980).

89. Downey Sav. & Loan Ass'n v. Metz (*In re* Metz), 820 F.2d 1495 (9th Cir. 1987); *In re* Weiss, 34 B.R. 346 (Bankr. E.D. Pa. 1983) (noting that the fact that nominal payments are to be made to unsecured creditors is not a per se violation of good faith requirement); U.S. Life Credit v. Carter (*In re* Carter), 9 B.R. 140 (Bankr. N.D. Ga. 1981); Fidelity Nat'l Bank v. Walsey (*In re* Walsey), 7 B.R. 779 (Bankr. N.D. Ga. 1980); *In re* Cloutier, 3 B.R. 584 (Bankr. D.Colo. 1980).

90. *In re* Anderson, 3 B.R. 160 (Bankr. S.D. Cal. 1980); Cleveland Trust Co. v. Keckler (*In re* Keckler), 3 B.R. 155 (Bankr. N.D. Ohio 1980).

shall refer to these cases as the *plan good faith* cases. The courts in the cases illustrating the other approach base their determination of good faith on the debtor's pre-plan and even pre-petition conduct. These courts concentrate on what might be referred to as *broad good faith*. I shall examine these distinct approaches in detail below and derive an organizing principle which is driven by the difference in philosophy between the two approaches.

1. Plan Good Faith

The explicit terms of § 1325(a)(3) require only an evaluation of good faith in the *proposal* of the plan. We may not have a clear definition of what constitutes "good faith," but the statute plainly dictates that good faith be considered with respect to proposal of the plan. Despite the plain meaning of the statute, only a minority of courts apply § 1325(a)(3) as written.[91] To this minority, it is clear that the good faith requirement relates only to the proposing of the plan, and therefore, these courts may most succinctly be referred to as the *plan good faith* courts.

This reliance on the statute itself has an interesting result. The *plan good faith* courts seldom rely on the legislative history of the statute. A few of them buttress their interpretations of the statute with arguments from the legislative history, but more commonly there is a decided lack of interest in that rather obscure and ambiguous source. This lack of interest is the direct result of relying on the unambiguous words of the statute, and it stands in startling contrast to the attention paid to the legislative history by the *broad good faith* courts.

A few early cases relied on their own close reading of the statute to determine that "good faith" was to be judged strictly in relation to proposing the plan, and not in relation to any broader factors (such as pre-petition conduct).[92] That is to say, "[s]ection 1325(a)(3) provides that the debtor's plan must be *proposed* in good faith, not that the debt was incurred in good faith."[93] Later cases reached the same conclusion,

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91. For the basis of this conclusion, see *supra* note 9, and *infra* note 173.

92. *See, e.g., In re* Carter, 9 B.R. 140 (Bankr. N.D. Ga. 1981), G.F.C. Consumer Discount Co. v. Scott (*In re* Scott), 7 B.R. 692 (Bankr. E.D. Pa. 1980) (determining, after a close reading of § 1325, that everything not excepted is discharged); Overland Park Dodge, Inc. v. Graff (*In re* Graff), 7 B.R. 426 (Bankr. D. Kan. 1980) (determining, after a review of statutory provisions and amendments, that Congress' clear intent was to allow the discharge of otherwise nondischargeable liability). *See also* Ravenot v. Rimgale (*In re* Rimgale), 669 F.2d 426 (7th Cir. 1982) (providing a list of factors to guide the good faith analysis—all involving the debtor's conduct in proposing the plan).

93. *In re* Belt, 106 B.R. 553, 564 (Bankr. N.D. Ind. 1989) (quoting *In re* Smith, 848 F.2d 813, 819 (7th Cir. 1988).

but did so explicitly in revolt against a tide of judicial activism that interpreted "good faith" as "a license to read into the statute requirements Congress did not enact."[94] While there is some evidence that the Supreme Court might adopt this strict interpretation of the statute, the Court has not directly addressed the issue.[95] Today, few cases and few scholars pitch their tents in the *plan good faith* camp.[96]

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94. *In re* Rimgale, 669 F.2d 426, 431 (7th Cir. 1982). *See also In re* Schaitz, 913 F.2d 452 (7th Cir. 1990); *In re* Farley, 114 B.R. 711 (Bankr. S.D. Cal. 1990).

95. In three relatively recent cases, the United States Supreme Court has held strictly to the terms of the Bankruptcy Code, although none of these cases directly addresses "good faith." Johnson v. Home State Bank, 501 U.S. 78 (1991) was a chapter 13 case dealing with serial filing. Refusing to infer a limitation on serial filing from the silence of the Code, the Supreme Court held that "expressly enumerated exceptions [are] presumed to be exclusive." *Id.* at 87 (following the holding of United States v. Smith, 499 U.S. 160, 167 (1991)). In Toibb v. Radloff, 501 U.S. 157 (1991) and Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), the Court held that the courts have no authority to place limitations on various sections of the Code (11 U.S.C. § 109 (1994) and 11 U.S.C. § 522(1) (1994) respectively) where Congress did not do so. Applied to the "good faith" context in Chapter 13, these opinions suggest that the Supreme Court would look to the plain meaning of the statute and refuse to read into the Code requirements that Congress did not see fit to write in.

96. Of the few articles on "good faith," two are noteworthy, and both address Chapter 11's "good faith" requirement. Prof. Janet A. Flaccus, in *Have Eight Circuits Shorted? Good Faith and Chapter 11 Bankruptcy Petitions*, 67 AM. BANKR. L.J. 401 (1993), argues energetically that the history of bankruptcy and the legislative history of the Code belie the broader readings of good faith in Chapter 11. Eugene J. DiDonato, in *Good Faith Reorganization Petitions: The Back Door Lets the Stranger In,* 16 CONN. L. REV. 1 (1983), reaches an opposite conclusion, though much of his article supports the strict interpretation of the statute. DiDonato notes, for example, that upon a close reading of Chapter 11, the statute does not require a petition to be filed in good faith but instead requires that only the plan be filed in good faith. *Id.* Thus, DiDonato illustrates (without commenting on it) the strict parallelism in the Code: in both chapters allowing a plan of reorganization, the statute requires only *propositional good faith. Id.*

DiDonato's article is also interesting in its musings on alternate grounds for deriving a good faith filing requirement. He notes the following possible statutory bases: 11 U.S.C. § 305(a)(1) (1994) allows the court after notice and hearing, to dismiss a case "if the interests of the debtor and creditor would be better served," *id.* at 5, 6; 11 U.S.C. § 105 (1994): "A bankruptcy court has the powers of a court of equity and under section 105 may issue any order, process or judgment necessary to carry out the provisions of the Bankruptcy Code. Because a bad faith petition constitutes an imposition on the court's jurisdiction, it is subject to dismissal based on equitable principles such as *lex nemini operatur iniquum, nemini facit injuriam* (the law never works an injury, nor does a wrong) or equitable doctrines such as the doctrine of clean hands," *id.* at 6, and 11 U.S.C. § 362(d) (1994), permitting relief from stay for cause upon application of a party in interest: "[A]lthough section 362(d) does not sanction dismissal of an entire case, by providing for the elimination of the stay if a petition is filed in bad faith, it has the effect of enforcing a good faith requirement." *Id.* at 7. These alternate grounds are critical for

The *plan good faith* cases further cluster into subgroups. Courts reading the statute restrictively tend to concern themselves with five issues: whether the plan is non-discriminatory; whether the plan encompasses the debtor's best efforts; whether the percentage of repayment is sufficient; whether the debtor has complied with the Code's procedural provisions; and whether the debtor's intentions in proposing the plan are honest.

A plan which unfairly discriminates between creditors is said to violate the good faith requirement.[97] Few of the cases explain where an anti-discrimination provision resides in § 1325(a) and this provision is not explicit in the Code. Courts have apparently imported the § 1325(a)(3) non-discrimination requirement from § 1322(b)(1).[98] More commonly, cases hold that discriminatory treatment may merely *bear on* the good faith determination.[99] According to some courts, discriminatory plans cannot be confirmed;[100] other courts approve plans which are discriminatory, as long as there is a reasoned discrimination.[101] For some courts, discrimination becomes significant only where a Chapter 7 bankruptcy is converted to a Chapter 13.[102] In these cases, there is no particular pattern, except that these courts confine their inquiry to the *terms* of the proposed plan.

A second factor examined by *plan good faith* courts is whether the debtor has drafted a plan which encompasses her best efforts.[103] It is not clear in which direction the debtor's best efforts must lie. On the one hand, the best effort toward complying with statutory requirements does not suffice for "good faith" to be met.[104] The most reasonable conclusion is that the debtor is required to make her best efforts toward

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DiDonato, because he is apparently determined to assert a good faith filing requirement. These alternatives are also interesting for our purposes, because a good faith filing requirement in Chapter 13, based on one or more of the sections cited above, might be a great deal more attractive than the arguments used by the courts. In addition, relying on these alternate grounds might avoid the judicial flights of fancy set out and analyzed in the text below.

97. *In re* Whittaker, 113 B.R. 531 (Bankr. D. Minn. 1990).

98. Section 1322, "Contents of plan," provides in subsection (b)(1) that the plan may designate a class or classes of unsecured claims, but "may not discriminate unfairly against any class so designated." 11 U.S.C. § 1322 (1994).

99. *In re* Sellers, 33 B.R. 854 (Bankr. D. Colo. 1983).

100. *In re* Mielke 39 B.R. 556 (Bankr. D. N.D. 1984); *In re* Moore, 24 B.R. 857 (Bankr. N.D. Ill. 1982); *In re* Walker, 20 B.R. 372 (Bankr. E.D. Va. 1982); *In re* Cooper, 3 B.R. 246 (Bankr. S.D. Cal. 1980).

101. *In re* Whittaker, 113 B.R. 531 (Bankr. D. Minn. 1990).

102. *In re* Warner, 115 B.R. 233 (Bankr. C.D. Cal. 1989).

103. *In re* Heard, 6 B.R. 876 (Bankr. W.D. Ky. 1980).

104. Hardin v. Caldwell (*In re* Caldwell), 895 F.2d 1123 (6th Cir. 1990).

funding the plan.[105] Courts occasionally provide a laundry list of factors when they make this "best efforts" inquiry.[106] On other hand, best efforts, even admitted as such, may be insufficient for a plan to be considered filed in good faith.[107] In fact, the debtor may not even be required[108] to use her best efforts. As with the non-discrimination requirement, the origin of the "best efforts" requirement is unclear. This requirement certainly is not expressed in the statute and may be a legacy from pre-Code practice.

A third inquiry in *plan good faith* considerations is whether a plan serves the best interests of the creditors. Some courts claim that the "'best interest of creditors test' [is] embodied in Section 1325(a)(4)."[109] This section, however, certainly does not explicitly contain this test.[110] This consideration may also remain from previous practice. The "best interests of the creditors" test was an old test, supplanted by new judicial guidelines for good faith objections.[111] Nevertheless, there are numerous references in Chapter 13 plan confirmation cases to a "best interests of creditors" test.[112] As might be expected, a plan's adequacy to meet the "best interests of the creditors" does not guarantee confirmation.[113]

A fourth inquiry provides the clearest and broadest distinction between the *plan good faith* and the *broad good faith* approaches. This investigation inquires into the debtor's equitable conduct within the Code and its procedural provisions, including its provisions for disclosure to

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105. Fidelity & Cas. Co. of N.Y. v. Warren (*In re* Warren), 89 B.R. 87 (B.A.P. 9th Cir. 1988); *In re* Myers, 52 B.R. 248 (Bankr. M.D. Fla. 1985); *In re* Weyand, 33 B.R. 553 (Bankr. D. Colo. 1983); *In re* Ware, 9 B.R. 24 (Bankr. W.D. Mo. 1981).

106. *In re* Hildremyr, 8 B.R. 676 (Bankr. S.D. 1981).

107. *In re* Kuriakuz, 155 B.R. 454 (Bankr. E.D. Mich. 1993).

108. *In re* Roy, 5 B.R. 611 (Bankr. M.D. Ala. 1980).

109. *In re* Iacovoni, 2 B.R. 256, 262 (Bankr. D. Utah 1980).

110. Section 1325(a)(4) provides that "the court shall confirm a plan if . . . the value . . . of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid . . . under chapter 7 . . . ." 11 U.S.C. § 1325(a)(4) (1994). It might be argued that the best interest of the creditors (even in a Chapter 13 which would have been a no-asset Chapter 7 liquidation) would always be to have a judgment rather than a zero or minimal payment and a discharge. Nevertheless, this section is generally referred to as the "best interests of the creditors" test.

111. *In re* Ramus, 37 B.R. 723 (Bankr. N.D. Ga. 1984).

112. *In re* Turner, 168 B.R. 882 (Bankr. W.D. Texas 1994); *In re* Doddy, 164 B.R. 276 (Bankr. S.D. Ohio 1994).

113. Cherry Creek Homeowners Ass'n v. Lincoln (*In re* Lincoln), 30 B.R. 905 (Bankr. D. Colo. 1983).

creditors and the court and the Code's payment provisions. Where the misconduct is intentional, the court's decision is easy. Good faith cannot be found where the debtor abuses the bankruptcy process by using the Code for unfair advantage in business,[114] nor where the debtor acts to prevent orderly and fair adjustment of credit relationships.[115] Misrepresentations in the plan or the bankruptcy schedules will usually lead to a "bad faith finding."[116] Here, of course, courts are on firm ground because these kinds of abuses are prohibited in Chapter 13 through the application of § 105(a)[117] and § 1307.[118]

The *plan good faith* courts, however, do not limit their investigation of the equitable conduct of the debtor in bankruptcy to willful misconduct. They also examine conduct that does not rise to the level of intentional misconduct, or at least cannot be proven to be such. Factors in determining whether a debtor has acted equitably within the bankruptcy process include a failure to list creditors,[119] high expenses,[120] and a failure or refusal to produce records requested by creditors.[121] One point must be clear, because it looms large in the later analysis: in each of these analyses, even in an examination of equitable conduct, the *plan good faith* courts restrict their inquiry to conduct related to the plan itself.

Some of the *plan good faith* courts conduct a still more searching examination, even broader than the "equitable conduct" analysis. These courts examine the honesty of the debtor's *intention* in filing her plan.

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114. Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936 (11th Cir. 1986), *cert. dismissed*, 478 U.S. 1028 (1986).

115. *In re* Elisade, 172 B.R. 996 (Bankr. M.D. Fla. 1994).

116. Heid v. Goeb (*In re* Goeb), 675 F.2d 1386 (9th Cir. 1982); *In re* Jacobs, 43 B.R. 971 (Bankr. N.Y. 1984) (illustrating that when court learns of material misrepresentations, it has duty to conduct a good faith hearing to safeguard the integrity of the bankruptcy process).

117. 11 U.S.C. § 105(a) (1994) grants the court broad power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," as well as "sua sponte, [take] any action or [make] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

118. 11 U.S.C. § 1307 (1994) sets out the conditions upon which a Chapter 13 filing can be voluntarily or involuntarily converted to a Chapter 7 or dismissed. Among the grounds listed are unreasonable delay, nonpayment of fees, failure to file a plan or make payments, and so forth.

119. *In re* Tipton, 118 B.R. 12 (Bankr. D. Conn. 1990); *In re* Hartdegen, 67 B.R. 230 (Bankr. N.D. Ala. 1986).

120. *In re* Strong, 26 B.R. 814 (Bankr. N.D. Ind. 1983) (determining that high monthly expenses were too far outside the spirit and purpose of the Code to be in good faith).

121. *In re* Sullivan, 40 B.R. 914 (Bankr. E.D. N.Y. 1984) (holding that the plan was not proposed in good faith when the debtor failed to cooperate with creditors who were investigating his financial conditions).

Honesty in this context appears to means full and complete disclosure, and honesty of purpose.[122] This inquiry is the most radical of the *plan good faith* examinations, because it is not objectively discoverable and involves an element not stated in the statute and not.

Both of the last two inquiries push the boundaries of what we have called *plan good faith*. Both inquiries look beyond the Chapter 13 plan to a consideration of the conduct during the pendency of the bankruptcy itself. What is most interesting about these inquiries is what they fail to determine. None of the *plan good faith* cases inquire into the debtor's conduct prior to the bankruptcy filing. That inquiry would seem to be far beyond the Bankruptcy court's jurisdiction. The *plan good faith* cases, even at their most expansive "equitable conduct" and "honesty of intention" analyses, stop short of making this inquiry. For this reason, although the "equitable conduct" and "honesty of intention" cases undertake the broadest of the *plan good faith* analyses, these cases generally do not find a lack of good faith. Thus, even with this broader approach, a court which undertakes a *plan good faith* inquiry most likely will find that a plan has been filed in good faith.[123]

2. *Broad Good Faith*

Other courts are not so restrained. The courts which undertake the *broad good faith* inquiry—representing the vast majority of good faith cases—examine debtor's pre-plan and even pre-petition conduct. The *broad good faith* inquiry begins where the *plan good faith* inquiry ends. The *plan good faith* courts might look beyond the plan, but even the most zealous confine themselves to an examination of the debtor's conduct within the bankruptcy court's jurisdiction. The *broad good faith* courts begin their inquiry by focussing on the debtor's conduct before

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122. *In re* Tobiason, 185 B.R. 59 (Bankr. D. Neb. 1995); *In re* Graves, 19 B.R. 402 (Bankr. W.D. La. 1982); *In re* Wiggles, 7 B.R. 373 (Bankr. N.D. Ga. 1980).

123. See statistics discussed *infra* note 173. There should be no mystery as to why this is so. The narrower the inquiry, the fewer factors the judge will consider. The fewer factors considered, the less chance that the court will find facts that might be considered "bad faith." The broader the inquiry, the greater chance that the creditor will present evidence or the court will discover facts that alleged bad faith. As bankruptcy judge William Greendyke noted, "every debtor 'is a bad guy' and [creditors] are going to give you lots of evidence about how bad the debtor is and how bad the debtor has been historically." Roundtable Discussion, *Good Faith: A Roundtable Discussion*, 1 AM. BANKR. INST. L. REV. 11, 23 (1993).

she ever came before the court and end the inquiry (if there are indeed any limits on the breadth of this analysis) outside the Code and even beyond the law altogether.

The cases that undertake a *broad good faith* inquiry are many and varied. Because the courts which undertake this inquiry recognize no organizing principle (at least none that imposes limits narrower than the broad laundry lists given above), superficial patterns in these cases are somewhat difficult to discern. Nevertheless, patterns do exist. Three distinct issues emerge as primary inquiries in the *broad good faith* analysis and surface as primary motivators in these courts' rulings. These inquiries include: the debtor's pre-plan conduct, the potential Chapter 7 dischargeability of debts, and potential abuse of the formal provisions of the Bankruptcy Code.

a. Pre-Plan Conduct

Many of the cases employing the *broad good faith* analysis examine the debtor's pre-plan conduct. While conduct could be pre-plan but post-petition in theory, scrutiny of this element in practice almost always involves inquiry into conduct before the petition was filed. Even courts sympathetic to the *broad good faith* analysis may question whether a court can consider pre-petition conduct.[124] Nevertheless, the *broad good faith* courts do ask: What kind of conduct gave rise to the claims the debtor seeks to discharge in Chapter 13?

If the language of the cases is to be believed, courts which examine pre-filing conduct do so cautiously. Some courts note that pre-filing conduct is only one of several considerations in their good faith analysis.[125] Other courts warn that it should not be the only factor considered.[126] Thus the issue of pre-filing conduct is sometimes considered only *one* of the relevant issues.

The Sixth Circuit's approach to good faith is typical of the courts' approach to examining pre-filing conduct. In its opinion in *In re Doersam*,[127] the Court manages to avoid holding that pre-petition conduct is relevant to the good faith inquiry while basing its opinion on

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124. *See In re* Lilley, 185 B.R. 489 (Bankr. E.D. Pa. 1995).

125. 550 West Ina Rd. Trust v. Tucker (*In re* Tucker), 989 F.2d 328 (9th Cir. 1993); *In re* Lilley, 185 B.R. 489 (Bankr. E.D. Pa. 1995); *In re* Elisade, 172 B.R. 996 (Bankr. M.D. Fla. 1994); *In re* Carver, 110 B.R. 305 (Bankr. S.D. Ohio 1990); *In re* Davis, 68 B.R. 205 (Bankr. S.D. Ohio 1986).

126. Metro Employees Credit Union v. Okoreeh-Baah (*In re* Okoreeh-Baah), 836 F.2d 1030 (6th Cir. 1988).

127. State of Ohio, Student Loan Comm'n v. Doersam (*In re* Doersam), 849 F.2d 237 (6th Cir. 1988).

the principle that it is. The opinion quotes dicta from a previous decision with approval, clearly giving the courts license to inquire into pre-plan conduct:

> Obviously, the liberal provisions of the new Chapter 13 are subject to abuse, and courts must look closely at the debtor's conduct before confirming a plan . . . . The view that the Bankruptcy Court should not consider the debtor's pre-plan conduct in incurring the debt appears to give too narrow an interpretation to the good faith requirement.[128]

The *Doersam* opinion does not attempt to square its broad inquiry with statutory language or Congressional intent (although, given the wild claims about Congressional intent reviewed below, the court may have avoided this discussion for the sake of judicial economy). More interestingly, the opinion fails to explain against what standard it judges the plan-good faith inquiry as "too narrow." The Court declines to accept the prima facie meaning of the statute without explaining why.[129]

The pre-plan conduct inquiry is, in essence, an investigation into how the debt originated. The manner in which the debt was incurred certainly results in greater scrutiny.[130] The rationale for this inquiry is that if the *debt was incurred in bad faith*, that factor might cause a court to take an additional look at the question whether the *plan was proposed in good faith*. For example, certain pre-plan conduct might cause the court to determine that no plan could be filed in good faith under any circumstances.[131] Some courts have held that the bad faith origin of a liability justifies the court in forcing a debtor to modify her

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128. *Id.* at 239 (citing Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 431-32 (6th Cir. 1982) (citing *In re* Kull, 12 B.R. 654, 659 (D.C.S.D. Ga. 1981)).

129. There is another oddity which should be noted briefly and then left for another more complete examination. This is the willingness of *broad good faith* courts to base their analysis on authority which is *not* authoritative. The *In re* Doersam opinion bases its holding on dicta from a previous case. *Id.* at 239. A court may be excused from elevating its own dicta to *ratio dicidendi*. However, it is distressing that the referenced authority was a federal district court in another circuit. *Id.* Although it is true that the 6th Circuit merely references the foreign case (appending a "see, e.g." tag), the district court case is still the only authority which is cited for the proposition that the "plan good faith" analysis is too narrow. *Id.* Particularly in the absence of any attempt to cite a close reading of the statute or legislative history, this weak citation highlights the void of authority. For a more extreme example of this conduct, see *infra* note 159.

130. *In re* Sotter, 28 B.R. 201 (Bankr. S.D. N.Y. 1983) (emphasizing that the genesis of major debt was criminal conduct).

131. *See* Schaffner v. I.R.S., 95 B.R. 62 (Bankr. E.D. Mich. 1988).

plan to make full payment of her debt, and if the debtor refuses, then justifies the court in lifting the stay.[132] Other courts boldly state that no plan will be confirmed whose confirmation would result in discharge of debts incurred by intentional fraud[133]—although this restriction is absent from § 1325(a)(3).

Courts are not alone in basing their good faith analysis on the origin of liability in pre-plan conduct. Scholars do the same. The language from one article is typical: "The discharge of debts which result from illegal activity is not consistent with the meaning of good faith or the intent of Congress to provide a remedy to adjust debts for the honest but unfortunate debtor."[134] This argument is patently circular. According to this argument, the meaning of "good faith" in the statute cannot mean what the statute says—i.e., good faith in proposing the plan. The meaning of good faith must therefore depend on what Congress intended (rather than what Congress explicitly wrote in the statute). The argument then asserts that the discharge of the particular kind of liability at issue cannot be consistent with "good faith" because the writer interprets Congressional intent to be something other than what is stated in the statute. This argument begins and ends with a denial of the words of the statute. Of course, neither courts nor writers cite any textual authority for this argument, because circular arguments are, by definition, self-referential.

In the consideration of pre-filing conduct, the courts' behavior differs significantly from the cautious approach they espouse. Courts claim to approach pre-filing conduct judiciously, considering it as only one of many factors in determining good faith. However, the results belie this claim of restraint. Almost without exception, when courts examine pre-filing conduct, this conduct determines the outcome of their analysis.

b. Non-dischargeability of the Liability in Chapter 7

When discussing pre-plan conduct, courts often refer to conduct which would have barred discharge had the case been filed in Chapter 7. In *Doersam*, for example, the court takes special note of "whether the debt would be non-dischargeable under Chapter 7 [as] a factor which is

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132. *In re* Baez, 106 B.R. 16 (Bankr. D. P.R. 1989).

133. *In re* Kern II, 40 B.R. 26 (Bankr. S.D. N.Y. 1984); *In re* Terry, 9 B.R. 314 (Bankr. D. Colo. 1981).

134. Daniel G. Chadwick, *In re Prine: Good Faith, Dischargeability and Conversion from a Chapter 7 to a Chapter 13 Bankruptcy*, 19 IDAHO L. REV. 115, 120 (1983).

relevant to the determination of good faith."[135] The court, like the scholar previously cited, may focus on debts which arise from illegality, which are nondischargeable in Chapter 7 through the provisions of § 523(a). Such considerations are typical of the courts undertaking a *broad good faith* analysis.

Courts undertaking a broad good faith analysis argue that "nondischargeable debts",[136] which are the kind of debts for which a Chapter 13 discharge is sought, would not be discharged in a Chapter 7 action: Therefore, these debts should not be discharged in a Chapter 13 action. This argument begins with the assertion that the purpose of Chapter 13 is repayment, not discharge. To justify this assertion the courts often refer to the legislative history, in the guise of a quotation from one of the many sources of legislative intent:

> The new chapter 13 . . . provide[s] a simple yet precise and effective system for individuals to pay debts under bankruptcy court protection and supervision. The new chapter 13 will permit almost any individual . . . to propose and have approved a reasonable plan for debt repayment . . . . As in current law, 100 percent payment plans will be encouraged.[137]

The legislative history is voluminous; proof that the legislative intent was to require payment need not have been made by the quoted language. Many other portions of the legislative history might have been chosen to exemplify this argument.[138] However, asserting that

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135. State of Ohio, Student Loan Comm'n v. Doersam (*In re* Doersam), 849 F.2d 237, 239, 240 (6th Cir. 1988).

136. Although these opinions—and even dissenting court's opinions—refer to "nondischargeable" claims, these claims are in fact *not* nondischargeable in Chapter 13. Non-dischargeability in Chapter 7 is based on the provisions of 11 U.S.C. § 523(a) (1996), imported by 11 U.S.C. § 727(a) (1995) into Chapter 7. The same 11 U.S.C § 523(a) exceptions to discharge are absent from the Chapter 13 section on discharge, 11 U.S.C. § 1328(1994). 11 U.S.C. § 523 is not completely absent, however; 11 U.S.C. § 1328(a)(2) refers to specific subsections as excepted from the Chapter 13 discharge. Clearly Congress did not forget about 11 U.S.C. § 523(a) when it wrote 11 U.S.C. § 1328; members of Congress merely chose not to except from Chapter 13 discharge most of what was nondischargeable in Chapter 7. Therefore these claims are *not* nondischargeable in the Chapter 13 context.

137. S. REP. NO. 95-989, at 13 (1978), *reprinted in* 1978 A.S.C.C.A.N. 5787 [hereinafter S.R. 989].

138. *See, e.g.*, H.R. REP. NO. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 [hereinafter H.R. 595] ("The purpose of Chapter 13 is to enable an individual . . . to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for repayment. In others, it may offer creditors a percentage of their claims in full settlement."); S.R. 989, *supra* note

these passages represent the sum total of "legislative intent" ignores contrary provisions which would prove that the intent of Congress was not to secure payment for the creditor but rather to secure a broad discharge[139] or a fresh start for the debtor.[140]

Whatever the basis for the nondischargeability argument in legislative history, the courts emphasize that debtors should not be able to use Chapter 13 to discharge what is nondischargeable in Chapter 7. For this reason, the type of debt which a Chapter 13 debtor seeks to discharge is germane to the question of good faith.[141] If the debts sought to be discharged in Chapter 13 are found to be nondischargeable under chapter 7, the Chapter 13 action will probably be found to have been filed in bad faith. Thus, Chapter 13 is held not to be properly used for the sole purpose of discharging "nondischargeable debt."[142] This is particularly true if the nondischargeable act approaches the level of an intentional

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137, at 141 ("Chapter 13 is designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor"); S.R. 989, *supra* note 137, at 12 ("In theory, the basic purpose of Chapter XIII has been to permit an individual to pay his debts and avoid [liquidation or straight] bankruptcy by making periodic payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid.").

139. For example, tucked into the provisions on Liquidation for the Consumer Debtor is the language: "In reorganization and individual repayment plan cases, the existence of circumstances that would bar discharge, such as misconduct or the six-year bar, will not be a bar to confirmation of a plan." H.R. 595, *supra* note 138, at 129. A footnote further elucidates this sentence by referring to "proposed 11 U.S.C. §§ 1129, 1141, 1325, 1328." *Id.* This language, particularly with the clarifying footnote, makes it clear that Congress intended that 11 U.S.C. § 523 not apply to Chapter 13. Furthermore, the House Report describes discharge as "[p]erhaps the most important element of the fresh start for a consumer debtor after bankruptcy". H.R. 595, *supra* note 138, at 128. The House Report notes that "the discharge, with the release from creditor collection attempts," is one of the most important aspects of the fresh start. *Id.* at 125.

140. *See, e.g.*, H.R. 595, *supra* note 138, at 118 ("[B]ankruptcy relief should be effective, and should provide the debtor with a fresh start."); *id.* ("[T]he debtor is given adequate exemptions and other protection to ensure that bankruptcy will provide a fresh start"); *id.* at 125 ("The two most important aspects of the fresh start available under the Bankruptcy laws are the provision of adequate property for a return to normal life, and the discharge, with the release from creditor collection attempts," *id.* at 126 ("[T]here is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start. . . . Thus, the bill . . . enunciates a bankruptcy policy favoring a fresh start").

141. *See* State of Ohio, Student Loan Comm'n v. Doersam (*In re* Doersam), 849 F.2d 237 (6th Cir. 1988). *See also* Circle Management Services, Inc. v. Wright (*In re* Wright) 36 B.R. 663 (Bankr. S.D. Ohio 1984) (finding that if the debtor meets the minimum statutory requirements, her good faith is not determined by her contribution, and that the nature of her debts must be considered only if nominal repayment is contemplated).

142. *In re* Schaitz, 913 F.2d 452 (7th Cir. 1990).

tort or criminal activity.[143] A minority of courts claim that the nondischargeability issue is only one of many factors to be considered, and is not, therefore, conclusive evidence of bad faith.[144] For most *broad good faith* courts, however, if there is an intent to discharge debt under Chapter 13 which would be nondischargeable under Chapter 7, the plan will likely be found to have been filed in bad faith.[145] The courts which dissent from this position represent a very small minority.[146]

c. Abuse of Provisions of the Code

When courts engaging in a *broad good faith* inquiry examine pre-petition conduct and the potential Chapter 7 dischargeability of debts, they stray from the field apparently prescribed by the explicit words of the Bankruptcy Code. Yet these examinations maintain some loose nexus with bankruptcy law. Many courts, however, further assert that the very election by a debtor of Chapter 13's provisions can be an abuse

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143. For examples of garden variety nondischargeable debt, see *In re* Schaitz, 913 F.2d 452 (7th Cir. 1990); *In re* Ross, 95 B.R. 509 (Bankr. S.D. Ohio 1988); *In re* Olp, 29 B.R. 932 (Bankr. E.D. Wis. 1983). For examples of criminal and tortious conduct, see Handeen v. LeMaire (*In re* LeMaire), 898 F.2d 1346 (8th Cir. 1990); *In re* Thomas, 118 B.R. 421 (Bankr. D. S.C. 1990); *In re* Kourtakis, 75 B.R. 183 (Bankr. E.D. Mich. 1987); *In re* Todd, 65 B.R. 249 (Bankr. N.D.Ill. 1986); *In re* Brock, 47 B.R. 167 (Bankr. S.D. Cal. 1985); for examples of fraud or misrepresentation, see Pioneer Bank of Longhart v. Rasmusen (*In re* Rasmussen), 888 F.2d 703 (10th Cir. 1989); *In re* Boyd, 57 B.R. 410 (Bankr. N.D. Ill. 1983); *In re* Troyer, 24 B.R. 727 (Bankr. N.D. Ohio 1982).

144. *See* Hardin v. Caldwell (*In re* Caldwell), 895 F.2d 1123 (6th Cir. 1990); *In re* Doersam, 849 F.2d 237 (6th Cir. 1988); *In re* Vensel, 39 B.R. 866 (Bankr. E.D. Va. 1984); *In re* Ali, 33 B.R. 890 (Bankr. D.Kan. 1983) (retreating from *In re* McMinn, 4 B.R. 150 (Bankr. D. Kan. 1980) and *In re* Garcia, 6 B.R. 35 (Bankr. D. Kan. 1980)); *In re* Miller, 24 B.R. 786 (Bankr. E.D. Pa. 1982); *In re* Graves, 19 B.R. 402 (Bankr. La. 1982); *In re* Minor,16 B.R. 147 (Bankr. S.D. Ohio 1981); *In re* Meltzer, 11 B.R. 624 (Bankr. N.Y. 1981); U.S. Life Credit v. Carter (*In re* Carter), 9 B.R. 140 (Bankr. N.D. Ga. 1981); G.F.C. Consumer Discount Co. v. Scott (*In re* Scott), 7 B.R. 692 (Bankr. E.D. Pa. 1980).

145. *See In re* Lilley, 185 B.R. 489 (Bankr. D. Pa. 1995); *In re* Smith, 848 F.2d. 813 (7th Cir. 1988); Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986), *on remand In re* Freeman, 66 B.R. 610 (Bankr. W.D. Va. 1986).

146. For such opinions, see *In re* Chaffin, 836 F.2d 215 (5th Cir. 1988); *In re* Farley, 114 B.R. 711 (Bankr. S.D. Cal. 1990); *In re* Belt, 106 B.R. 553 (Bankr. N.D. Ind. 1989); *In re* Riggleman, 76 B.R. 111 (Bankr. S.D. Ohio 1987); *In re* Kern, 40 B.R. 26 (Bankr. D. N.Y. 1984); Overland Park Dodge, Inc. v. Graff (*In re* Graff), 7 B.R. 426 (Bankr. D. Kan. 1980).

of the purposes of the Code. These courts provide the greatest insight into what motivates the *broad good faith* courts.

The "abuse of the provisions of the Code" reasoning must be carefully distinguished from the examination by the *plan good faith* courts of the debtor's conduct within bankruptcy. The *plan good faith* courts examine how the debtor treated the procedures and requirements of the Code and the directives of the bankruptcy court. They conclude that an uncooperative debtor may lack the good faith required by the Code. The "abuse of the provisions of the Code" courts assert that the *act of electing the remedies of Chapter 13* is itself evidence of bad faith.

This odd assertion shares one key presumption with the pre-plan conduct analysis and nondischargeability arguments: that the statute cannot mean what it appears to say. The *broad good faith* courts argue that the statute could not have meant that the courts must ignore conduct prior to the proposal of the plan, nor that Congress intended to allow the discharge of liability under one chapter which would be nondischargeable under another section. It is but a small further step to argue that although the Code permits a Chapter 13 discharge, election of the discharge is an abuse of the Code.

Many courts explicitly refer to Chapter 7 in determining that the filing of Chapter 13 was abusive, and therefore, not made in good faith. These courts reason that an abuse of the Code occurs when a debtor attempts to use the provisions of Chapter 13 as a substitute for the provisions of Chapter 7—at least, when the principal motive is to circumvent exceptions to discharge rather than make meaningful payments[147] of debt.[148] Courts espousing this view take particular umbrage when they believe that the Chapter 13 action was filed to avoid the restrictions of Chapter 7.[149]

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147. The "meaningful payments" language reflects a long-standing and energetic debate about whether a debtor had to pay a certain percentage of his unsecured debt in order to reach the "good faith" threshold. Courts mandating certain percentages fell within the *broad good faith* camp, both in their willingness to read this requirement into the Code, and in their unwillingness to read the Code's Chapter 13 discharge provisions literally. Congress, however, resolved the debate by amending 11 U.S.C. § 1325(b) in 1984, to provide a payment standard.

The "meaningful payments" requirement, although apparently contrary to it, is clearly an addition to the Code. Nevertheless, for a reasoned and sympathetic apology for inserting the requirement, see *In re* Iacovoni, 2 B.R. 256 (Bankr. D. Utah 1980) (examining several zero payment Chapter 13 plans and arguing that the Code, as drafted, is out of balance because creditors are not represented and that the court, by "reading in" necessary requirements, must bring the Code back into balance).

148. *In re* Satterwhite, 7 B.R. 39 (Bankr. S.D. Tex. 1980).

149. *See, e.g., In re* Jacobs, 102 B.R. 239 (Bankr. E.D. Ok. 1988); *In re* Meltzer, 11 B.R. 624 (Bankr. E.D. N.Y. 1981).

Other courts simply posit that the use of Chapter 13's broad discharge provisions is a manipulation of the "technicalities" of the Code and therefore not made in good faith. These courts argue that good faith requires more than technical compliance with the statute. These courts require of the debtor good faith and honesty of purpose. They focus on the debtor's state of mind.[150] These courts, therefore, feel themselves entitled to weigh the true intention of the debtor against the literal reading of the statute. When a literal application of "best interests of creditors" test would result in the discharge of a substantial obligation, these courts feel justified in ignoring the literal provisions of the statute.[151] Where a Chapter 13 action was used to execute a "real purpose" of giving the debtors the opportunity to spread attorney fee payments over sixteen months, the court held that election of Chapter 13 was "an abuse of the spirit and purpose" of the chapter despite the debtor's compliance with the words of the Code.[152] "[W]here [a] debtor's primary and overriding purpose [was] to manipulate Chapter 13 as a device to escape nearly all of his liability," a Chapter 13 plan should not, according to these courts, be confirmed, even if the debtor fulfilled the "technical requirements" of the statute.[153] The technically correct use of Chapter 13 in such a way that the plan violates the underlying policy of "securing an orderly and *fair* adjustment of the relationship between debtor and creditors" does not satisfy the good faith requirement.[154]

The *broad good faith* courts have traveled far beyond what the statute authorizes. Admittedly, the conduct of some debtors has been so abusive of bankruptcy protection as to give the courts some excuse for this expansive inquiry. In one case, the debtors used Chapter 13 for the "greedy and unworthy purpose" of rejecting an option agreement they felt was not sufficiently profitable.[155] The court understandably found

150. *In re* Hawes, 73 B.R. 584 (Bankr. E.D. Wis. 1987).
151. *In re* Sotter, 28 B.R. 201 (Bankr. S.D. N.Y. 1983).
152. *In re* San Miguel, 40 B.R. 481, 485, 486 (Bankr. D. Colo. 1984).
153. *In re* Norman, 162 B.R. 581, 583 (Bankr. M.D. Fla. 1993).
154. *In re* Elisade, 172 B.R. 996, 1000 (Bankr. M.D. Fla. 1994) (quoting Northwest Place Ltd. v. Cooper (*In re* Northwest Place Ltd.), 108 B.R. 809, 815 (Bankr. N.D. Ga. 1988)) (emphasis omitted).
155. Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936, 941 (11th Cir. 1986), *cert. dismissed*, 478 U.S. 1028 (1986).

that stratagem to demonstrate a lack of good faith, although the technical requirements of the statute were arguably fulfilled.[156]

Most often, however, the courts label as "abuse" a use of the statute to reach an end disapproved by the court. A Chapter 13 debtor's attempt to avoid a large debt to a former employer that resulted from "betrayal of a close personal relationship," breach of trust and felonious conduct was considered to be an unfair manipulation of the code,[157] even though § 1325(a) allows the discharge of these very claims.

The proposition that a person manipulates a statute by electing to do what the statute on its face and by its history specifically allows, is shocking. What motivates a court of law to take such an extreme position? A search for the real motivating principle in the *broad good faith* cases reveals that beneath the surface discussions of pre-plan conduct, dischargeability, or abuse of the provisions of the Code, lies the court's moral judgement of the debtor and an expression of its moral outrage.

What is truly at issue in these cases is whether or not the judge is outraged by the debtor's actions prior to seeking bankruptcy protection. In cases in which an act is so reprehensible that the court refuses to be a party to discharge the liability, the court searches for an excuse in the debtor's past and then justifies its decision in "good faith" terms, without regard to compliance with the statute. In *In re LeMaire*,[158] the Eighth Circuit reacts so violently to a liability that arose from an intentional shooting that it vents its outrage several times in the opinion. In overturning a district court's finding of "good faith," the court refers, without being specific, to trial evidence, public policy, pre-plan conduct, and the maliciousness of the injury. The court fails to explain how the Code authorizes inquiry into these factors in the good faith analysis.[159]

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156. *Id.*

157. *In re* Sitarz, 150 B.R. 710, 725 (Bankr. D. Minn. 1993).

158. Handeen v. LeMaire (*In re* LeMaire), 898 F.2d 1346 (8th Cir. 1990).

159. *Id.* at 1348, 1349. The *Lemaire* opinion provides a fascinating example of the court's willingness to rely on authority which is not authoritative. *See* discussion *supra* note 129. The *LeMaire* court apparently faced a quandary between a debtor whom the court was not willing to allow to pass over the "good faith" hurdle, and the court's own precedent which appeared to prevent the application of a *broad good faith* inquiry. The Eighth Circuit's own opinion in *In re* Estus countenanced the laundry list/totality of the circumstances approach. 695 F.2d 311 (8th Cir. 1982). The "totality of circumstances" approach would have made the denial of good faith easier for the *LeMaire* court. The court, however, could not easily use *Estus*. *In re* Lemaire, 898 F.2d at 1349. After *Estus*, in 1984, Congress amended 11 U.S.C. § 1325, adding § 1325(b). *Id.* The Eighth Circuit followed the amendment with its opinion in Education Assistance Corp. v. Zellner (*In re* Zellner), 827 F.2d 1222 (8th Cir. 1987). *Zellner* held that the effect of the statutory amendment was to limit the focus of the *Estus* inquiry to a plan good faith inquiry: i.e., whether the debtor stated his financial condition accurately, whether she

The Court of Appeal's lengthy and detailed dissent emphasizes that the majority's claims are hollow and lack foundation in bankruptcy history, legal precedent, or in the wording of the statute. This dissent makes the majority's rush to judgment all the more obvious.

The Eighth Circuit is not alone in acting on its outrage by failing to find "good faith." In *In re Caldwell*,[160] the Sixth Circuit scolded a debtor who tried to discharge a judgment arising from false arrest, malicious prosecution, and false imprisonment. The opinion overflows with moral outrage, speaking of chapter 13 as a "salvation,"[161] while contrasting the debtor's "veiled" intentions[162] and his "unbroken pattern of deceit and delay."[163] The opinion ends with an emphatic moral judgment: "Caldwell is not the *type of debtor* whom the bankruptcy laws were meant to protect."[164] The court based its finding of bad faith, in part, on thid debtor's noncooperation with bankruptcy procedure; but the determinative factor was "what he has done since the judgment to avoid paying it."[165]

The outrage evident in these opinions is best exemplified by the Sixth Circuit's statements in *Memphis Bank & Trust v. Whitman*:[166]

> Obviously the liberal provisions of the new Chapter 13 are subject to abuse, and courts must look closely at the debtor's conduct before confirming a plan. We should not allow a debtor to obtain money, services or products from a seller by larceny, fraud or other forms of dishonesty and then keep his gain by filing a Chapter 13 petition within a few days of the wrong. To allow the debtor to

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engaged in fraud or misrepresentation in the bankruptcy court, and so forth. *Id.* at 1227. Thus, if the Eighth Circuit were to follow its own opinion in *Zellner*, it would find it more difficult to withhold a "good faith" finding to *LeMaire*. The court avoids this difficulty through the judicial equivalent of a half gainer with a double twist: the *LeMaire* opinion cites a Seventh Circuit interpretation of the Eighth Circuit's own *Zellner* opinion to prove that *Zellner* actually preserved the "totality of the circumstances" approach that in fact *Zellner* actually disapproved. *In re* LeMaire, 898 F.2d at 1349 (citing *In re* Smith, 848 F.2d 813, 820 n.8 (7th Cir. 1988)). Thus, in essence, the Eighth Circuit relies on a misinterpretation of its own precedent by another circuit court of appeals in order to invalidate its own precedent. In one way or another, these are the kinds of gymnastics which the broad good faith courts often exhibit.

160. Caldwell v. Hardin (*In re* Caldwell), 895 F.2d 1123 (6th Cir. 1990).
161. *Id.* at 1126.
162. *Id.*
163. *Id.* at 1127.
164. *Id.* at 1128 (emphasis added).
165. *Id.* at 1127.
166. 692 F.2d 427 (6th Cir. 1982).

> profit from his own wrong In this way through the Chapter 13 process runs the *risk of turning otherwise honest consumers and shopkeepers into knaves.*[167]

The courts must not only protect the Code and their jurisdiction, but must also, apparently protect the debtors from their own evil inclination toward sin and knavery.

These courts are not isolated proponents of a discredited philosophy. Courts across the country and from different circuits have transformed their outrage over the acts giving rise to liability into justification for a finding of bad faith.[168] Judges are not shy about admitting that their outrage is a significant factor; the occasional judge will reveal his reasoning outside the scope of a written opinion.[169]

Although the *broad good faith* analysis is the dominant approach, and the "abuse of the Code" justification is a strong theme within that analysis, a few courts dissent from it. These courts maintain that a debtor may file a plan which fulfills the good faith requirement, even though debts were incurred by pre-petition bad faith.[170] A few judges remind their colleagues that a court should not let reprehensible conduct distract it from its analysis of whether there is good faith in proposing the plan. One opinion warns: "Care must be taken not to allow revulsion over a debtor's past deeds to detract from or impair a finding of good faith

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167. *Id.* at 432 (emphasis added).

168. *See In re* Kourtakis, 75 B.R. 183 (Bankr. E.D. Mich. 1987) (finding that debtor does not demonstrate requisite honesty of intentions given nature of criminal act giving rise to the liability); *In re* Brock, 47 B.R. 167 (Bankr. S.D. Cal. 1985) (noting that the motivation of debtor was to escape the consequences of repayment, and, in apparent contradistinction, that the Code is intended to relieve the "honest debtor"); *In re* Troyer, 24 B.R. 727 (Bankr. N.D. Ohio 1982) (basing a "lack of good faith" ruling on language about the "dishonest debtor," as though pre-petition conduct proved that the debtor was in some continuing way dishonest and, therefore had not earned a finding of good faith).

169. In a discussion about Chapter 11 good faith, bankruptcy judge William Greendyke said that bad faith is "a matter of how offended the bankruptcy judge is that these parties are in front of him or her and whether or not the judge decides that the case is one that is susceptible of reorganization." Roundtable Discussion, *Good Faith: A Roundtable Discussion*, 1 AM. BANKR. INST. L. REV. 11, 23 (1993). Judge Greendyke then reviewed the laundry list of factors prescribed for the good faith analysis—one not dissimilar from the Chapter 13 list—and concluded: "If the case is so egregious, if you will, that one factor outweighs all the others, you just need to consider all the remaining factors or to look at their potential application to make sure of your decision. It is appropriate to give different weight to the various factors." *Id.* at 24. As noted above, it is commonly said that the good faith requirement in Chapter 11 is essentially the same as in Chapter 13. There is no reason to believe that this judge's opinion is immaterial here, nor that his opinion is particularly radical. None of the other panelists objected to his remarks as being extraordinary. *Id. passim.*

170. *In re* Eppers, 38 B.R. 301 (Bankr. N.M. 1984); Margraf v. Oliver, 28 B.R. 420 (Bankr. S.D. Ohio 1983). *See also* United States v. Verdunn, 187 B.R. 996 (Bankr. M.D. Fla. 1995), *rev'd*, 89 F. 3d 799 (11th Cir. 1996); *In re* Lilley, 185 B.R. 489 (Bankr. E.D. Pa. 1995).

where that debtor is making an effort to satisfy past obligations to the extent possible and still embark upon a fresh start."[171] More concisely, one court notes the tortured interpretations mentioned above and pointedly remarks: "This Court's dissatisfaction with the result [of a *plan good faith* analysis] is not a sufficient ground to support a conclusion that the debtor's plan is not proposed in good faith."[172]

Nevertheless, the *broad good faith* analysis remains the majority approach. The words of the statute do not limit these courts' approach. Pre-plan conduct, nondischargeability, and abuse of the Code are all laid open to the *broad good faith* courts' inquiry.

IV. OUT OF THE CODE AND INTO MORALITY

The *broad good faith* courts undertake a broad inquiry into the debtor's conduct and intentions. I shall first examine the inquiry itself, and in particular the moral language used by these courts. Next, because the bankruptcy courts often claim that the authority for their actions arises from their status as courts of equity, I consider the traditional orientation of courts of equity. Finally, I examine the purposes of a code and the role of predictability in commercial law, and ask whether the *broad good faith* courts satisfy these purposes.

A. A Moral Inquiry

What connects pre-plan conduct, nondischargeability in Chapter 7, abuse of the provisions of the Code, and outrage over pre-plan conduct? Something must, for these considerations characterize the analysis of courts which seem driven to find a lack of good faith. What distinguishes these considerations from considerations of good faith in proposing the plan itself? Again, something must distinguish the two different sets of considerations, because courts which consider the first set of factors seldom invoke deficiencies in the plan itself.

In fact, the distinction between *broad good faith* and *plan good faith* has remarkable implications. One would expect that courts applying

171. *In re* Chura, 33 B.R. 558, 560 (Bankr. D. Colo. 1983). *See also In re* Belt, 106 B.R. 553, 565 (Bankr. N.D. Ind. 1989) (citing *In re* Chura, 33 B.R. 558, 560, and adding the caution that "[o]nly where there is a showing of serious debtor misconduct or abuse should a chapter 13 case be found lacking good faith.").

172. *In re* Farley, 114 B.R. 711, 716 (Bankr. S.D. Cal. 1990).

neutral principles to the same statute would reach roughly similar results. Yet this is not the case. An examination of the case law reveals that a court that approaches a Chapter 13 plan with a broad good faith strategy is almost twice as likely to find a lack of good faith as is a court which applies a plan good faith inquiry.[173]

There are various possible hypotheses that might elucidate an organizing principle. One hypothesis is that the cases exhibit successive waves of interpretation and reaction, and thus the real explanation behind these cases is an historical one.[174] Another theory is that there is a disagreement not over the meaning of good faith, but rather over whether the "manifest intent" of the statute is repayment,[175] dis-

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173. The results of the two different approaches are startling. In the approximately 200 cases reviewed by the author, see *supra* note 9, where courts adopted a *broad good faith* approach, they declined to find that the Chapter 13 plan was proposed in good faith in 87% of the cases. Yet where courts adopted a *plan good faith* approach, they declined to find good faith in only 46% of the cases. These are preliminary findings which must await a formal statistical analysis. Of course, the normal disclaimers about statistical sampling must apply.

174. There seem to be three distinct epochs. In the beginning, the courts read the statute closely and interpreted it literally. *See, e.g.*, Johnson v. Vanguard Holding Corp. (*In re* Johnson), 708 F.2d 865, 868 (2d Cir. 1983) ("[W]here the statute is silent, courts should not read into the Act any per se limitations. . . ."); Deans v. O'Donnell, 692 F.2d 968 (4th Cir. 1982); Barnes v. Whelan, 689 F.2d 193 (D.C. Cir. 1982); Ravenot v. Rimgale (*In re* Rimgale), 669 F.2d 426 (7th Cir. 1982). This gave way to a period during the middle and late 1980's in which courts espoused the *broad good faith* inquiry in order to stop perceived abuses of the statute. *See, e.g.*, State of Ohio, Student Loan Comm'n v. Doersam (*In re* Doersam), 849 F.2d 237 (6th Cir. 1988). This period in turn seems to be slowly giving way to confusion, a confusion in which a minority of courts have retreated to the words of the statute. This minority is lead by cases such as *In re* Farley, 114 B.R. 711 (Bankr. S.D. Cal. 1990), buttressed by language in recent Supreme Court bankruptcy rulings: Johnson v. Home State Bank, 501 U.S. 78 (1991), Toibb v. Radloff, 501 U.S. 157 (1991), and Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). This historical/evolutionary description does not explain, however, why some courts continue to cling to the *broad good faith* inquiry at its most radical. Many cases, even after the clear "strict construction" message sent by the recent Supreme Court cases, continue the *broad good faith* analysis. *See, e.g.*, *In re* Allard, 196 B.R. 402 (Bankr. N.D. Ill. 1996) (continuing the *broad good faith* analysis contrary to the statute, years after the Supreme Court indicated that such an extra-statutory approach was inappropriate). *See also In re* Norman, 162 B.R. 581 (Bankr. M.D. Fla. 1993).

175. For support for the proposition that Congress' main intent in the Bankruptcy Code was to require (or allow) repayment of the debtor's debts, see H.R. 595, *supra* note 138, at 118 ("The purpose of Chapter 13 is to enable an individual . . . to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement."); S. R. 989, *supra* note 137, at 141 ("Chapter 13 is designed to serve as a flexible vehicle for the repayment of part or all of the allowed claim of the debtor."); *id.* at 12 ("In theory, the basic purpose of Chapter XIII has been to permit an individual to pay his debts and avoid [liquidation or straight] bankruptcy by making periodic payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid."); *id.* at 13 ("The new chapter 13 . . . provide[s] a simple yet precise and effective

charge,[176] or even a fresh start.[177] From this vantage point, the underlying conflict in the cases could be understood as resulting from different interpretations of legislative history.[178] A cynic might maintain that the true debate is over ends and means: If the end produced by a literal reading of the statute is abhorrent, can the court

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system for individuals to pay debts under bankruptcy court protection and supervision. The new chapter 13 will permit almost any individual . . . to propose and have approved a reasonable plan for debt repayment . . . . As in current law, 100 percent payment plans will be encouraged.").

176. For support for the proposition that Congress' principal intention was to grant the debtor a broad discharge, see H.R. 595, *supra* note 138, at 129 ("In reorganization and individual repayment plan cases, the existence of circumstances that would bar discharge, such as misconduct or the six year bar, will not be a bar to confirmation of a plan.") *Id.* at 129 n. 71 (proving by the language of this footnote, which refers to "proposed 11 U.S.C. [§§] 1129, 1141, 1325, 1328," and which is tucked into provisions on Liquidation for the Consumer Debtor, that the statute meant precisely what it says: that 11 U.S.C. § 523(a) provisions were not to apply in Chapter 13); *id.* at 128 ("Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge."); *id.* at 125 ("The two most important aspects of the fresh start available under the Bankruptcy laws are the provision of adequate property for a return to normal life, and the discharge, with the release from creditor collection attempts.").

177. For support for the proposition that the actual intention of Congress was to procure a fresh start for the debtor, see H.R. 595, *supra* note 138, at 118 ("[B]ankruptcy relief should be effective, and should provide the debtor with a fresh start."); *id.* "[T]he debtor is given adequate exemptions and other protection to ensure that bankruptcy will provide a fresh start."); *id.* at 125 ("The two most important aspects of the fresh start available under the Bankruptcy laws are the provision of adequate property for a return to normal life, and the discharge, with the release from creditor collection attempts."); *id.* at 126 ("[T]here is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start."); *id.* ("Thus, the bill . . . enunciates a bankruptcy policy favoring a fresh start.").

178. One of the most interesting parts of the debate is that the actual nonexistence of legislative history as an authoritative text is never mentioned. The content of legislative history is discussed; the primacy or exclusivity of different themes is debated; various portions of the legislative record are contrasted against other arguably weaker portions. Yet nobody mentions that which is obvious throughout the review of the legislative history: that there is no unified, internally consistent text which "is" legislative history. The House and Senate reports are each internally inconsistent and mutually contradictory. Portions of each report concurrently support opposing positions while also supporting third positions. This cannot be surprising, because the legislative history, like the statute itself, is the product of legislative compromise and bargaining, and the scars of these battles and their resolutions appear in the legislative reports. Nevertheless, as a practical matter, legislative history does not exist to resolve the "intent of Congress" debate, nor to provide an answer to the question: What is good faith? Its nonexistence, however, does not prevent it from being cited.

vary the interpretation of the plain words of the statute[179] or must it defer to the legislature?[180]

None of these hypotheses, however, answer the question of what motivates the *broad good faith* courts in their acrobatic attempts to deny a good faith finding. Taking the language of the *broad good faith* opinions seriously, the conclusion that morality is what drives the *broad good faith* inquiry is difficult to avoid.[181] Both the *broad good faith*

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179. For the leading exponent of this view, see *Memphis Bank & Trust v. Whitman*, in which the Sixth Circuit in 1982 wrote:

> [T]his subsection [§ 1352(a)(3)] says only that the wage earner plan must be 'proposed' in good faith, not that the debt in question be incurred in good faith. . . . The 'good faith' requirement is neither defined in the Bankruptcy Code nor discussed in the legislative history. The phrase should, therefore, be interpreted in light of the structure and general purposes of Chapter 13. Obviously the liberal provisions of the new Chapter 13 are subject to abuse, and courts must look closely at the debtor's conduct before confirming a plan. We should not allow a debtor to obtain money, services or products from a seller by larceny, fraud or other forms of dishonesty and then keep his gain by filing a Chapter 13 petition within a few days of the wrong. To allow the debtor to profit from his own wrong in this way through the Chapter 13 process runs the risk of turning otherwise honest consumers and shopkeepers into knaves. The view that the Bankruptcy Court should not consider the debtor's pre-plan conduct in incurring the debt appears to give too narrow an interpretation to the good faith requirement.

692 F.2d 427, 431, 432. *See also In re* Boyd, 57 B.R. 410, 411 (Bankr. N.D. Ill. 1983) ("Congress [did] not wish the Bankruptcy Code to be a haven for criminal offenders and has stated that the criminal actions . . . may proceed under the exception granted by § 362(b)(1) to the automatic stay . . . .").

180. The most articulate proponent of restraint is *In re* Farley, in which the court states:

> As much as this Court believes that debts nondischargeable under Chapter 7 should be discharged under Chapter 13 only if paid through the plan, that is for the Congress to provide, not the judiciary. . . . Notwithstanding the convictions of this Court about the inequitable result which obtains in a case such as this, this Court is compelled to conclude that the plan as proposed should be confirmed . . . . This Court's dissatisfaction with the result is not a sufficient ground to support a conclusion that the debtor's plan is not proposed in good faith. It is for the Congress to redress what this Court perceives as a flaw in the statutory scheme of Chapter 13.

114 B.R. 711, 715-16 (Bankr. S.D. Cal. 1990).

As discussed *supra* note 174, three recent Supreme Court cases appear to support the Farley position. *See* Johnson v. Home State Bank, 501 U.S. 78 (1991); Toibb v. Radloff, 501 U.S. 157 (1991); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).

181. I do not wish to create a new school of legal analysis when I suggest that the proper inquiry for aberrant opinions is *not*, "What does the law say?", but rather, "To what use is a particular idea put?" On the one hand, the case study method taught in law school presumes that courts used sound legal reasoning. Based on this premise, with the process of reasoning rendered transparent, law students are encouraged to derive rules from the cases. After law school, lawyers are seldom encouraged to ask whether a particular line of reasoning "makes sense." On the other hand, radical approaches to the law, such as the Marxist and other ideologically based analyses, reach such absurd results (in reaching for hidden agendas) that they thereby warn us of the danger of

courts and the *plan good faith* courts, in their criticisms of their more expansive colleagues, recognize that this is the real motivating factor.

The *broad good faith* courts' define good faith in terms saturated with morality. Good faith is described as full and complete disclosure and honesty of purpose.[182] The subjective intention of the debtor (not his objective conduct) is one of the factors in the *broad good faith* analysis,[183] and is often the only factor considered in judging good faith.[184] Such courts do not find anything odd in describing the good faith inquiry in terms that seem to leap out of the story of the expulsion from Eden: "the 'good faith' requirement of § 1325(a) is the only safety valve available through which plans attempting to twist the law to malevolent ends may be cast out."[185]

In fact, many of the *broad good faith* courts emphasize that they are judging the debtor's moral status, not her objective conduct. These courts rail against false intentions, deceit and delay,[186] frustration of

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straying too far from this presumption of proper reasoning. Yet the presumption of propriety does not help us to understand why a court might employ specious reasoning. The functional approach that I suggest does answer this question because this approach asks what motivates a court to pick a particular tool.

Take legislative history as an example. Random choice does not dictate that a *broad good faith* court will choose a "payment" portion of the congressional record, nor that a *plan good faith* court will choose an equally authoritative "discharge" portion of the record. Rather, these portions of the record are tools that build particular structures. They are tools chosen specifically because they build a particular structure. The real question, therefore, must be functional: What function does this particular piece (of evidence, argument, or legislative history) serve in the court's reasoning? It is only through this approach that one can understand the contortions of opinions like that of the *LeMaire* court, *supra* notes 158, 159. Without such an approach to those tortured decisions, one must either dismiss the opinions as aberrant or (even worse!) accept the opinions as proper legal discourse. In either case, one cannot learn anything about what motivates the courts or what deep structures might underlie apparently inexplicable results.

182. *In re* Tobiason, 185 B.R. 59 (Bankr. D. Neb. 1995); *In re* Graves, 19 B.R. 402 (Bankr. W.D. La. 1982); *In re* Wiggles, 7 B.R. 373 (Bankr. N.D. Ga. 1980).

183. *In re* Stein, 36 B.R. 521 (Bankr. M.D. Fla. 1983).

184. *In re* Schaitz, 913 F.2d 452 (7th Cir. 1990); *In re* Fawcett, 758 F.2d 588 (11th Cir. 1985); Johnson v. Vanguard Holding Corp. (*In re* Johnson), 708 F.2d 865 (2nd Cir. 1983); Ford Motor Credit Co. v. Jenkins (*In re* Jenkins), 20 B.R. 642 (E.D. Ark. 1982); Barnes v. Whelan, 689 F.2d 193 (D.C. Cir. 1982).

185. Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936 (11th Cir. 1986) (quoting *In re* Leal, 7 B.R. 245, 248 (Bankr. D. Colo. 1980)).

186. Caldwell v. Hardin (*In re* Caldwell), 895 F.2d 1123 (6th Cir. 1990).

fair dealing,[187] lack of remorse,[188] impenitence,[189] and of course, knavery.[190]

The clearest example of this expanding moral overlay is the "honest debtor" language that inexplicably appears in the cases. Courts and commentators often use the term "honest debtor," exclusively to deny the blessings of "good faith" to a debtor. The assertion that only an honest debtor qualifies for bankruptcy protection forms the basis of a syllogism:

(A) Bankruptcy is designed to protect an honest debtor;
(B) The debtor is not an honest debtor if she attempts to discharge what would be a nondischargeable liability (or discharge with minimum payments, or whatever it is that the writer objects to);
(C) Therefore, no matter what the statute says, the Bankruptcy statute can't protect this debtor.

This reasoning appears in several cases, but always as subtext. Because the phrase "honest debtor" is used with such authority, this writer conducted an extensive review of the legislative history to determine its origin.

The origin of the "honest debtor" is mysterious. The language may have gained currency from *Local Loan Co. v. Hunt*,[191] a 1934 Supreme Court case interpreting the Bankruptcy Act:

> One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams v. U.S. Fidelity & G. Co.*, 236 U.S. 549, 554-555. This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. . . . The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor. . . .[192]

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187. *In re* Elisade, 172 B.R. 996 (Bankr. M.D. Fla. 1994).
188. *In re* Kourtakis, 75 B.R. 183, 187 (Bankr. E.D. Mich. 1987) ("[A]lthough Kourtakis has some remorse, it is apparent from his testimony that the remorse is not complete by any means.").
189. *Id.* ("Clearly, Kourtakis does not accept the full measure of the verdict against him and has filed this bankruptcy in substantial part to effect a reduction of the verdict. Kourtakis's intentions in this regard are thus not entirely honest.").
190. *See* Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 431, 432 (6th Cir. 1982), *supra* note 167 and accompanying text.
191. 292 U.S. 234 (1934).
192. *Id.* at 244-245 (emphasis omitted).

Numerous Code cases have adopted this argument.[193] Many writers have also focussed on this language, alluding to "honest debtors" as though it were a term originating with Congress:

> Congress enacted Chapter 13 of the Bankruptcy Reform Act of 1978 (Code) to encourage the honest but unfortunate debtor to make greater use of composition in bankruptcy. The framers of the Code intended to give the honest debtor a fresh start by permitting the debtor to retain property while paying debts and to avoid the stigma of a Chapter 7 liquidation. Although the Code permits the honest debtor in Chapter 13 to accomplish these goals, certain provisions lend themselves to ambiguous interpretation to the extent that Chapter 13 may be used be used by the dishonest debtor to avoid payment of debts.[194]

Both Code cases and legal writers, however, fail to specify the location in the Code or in the Congressional debate where the requirement of a debtor's "honesty" appears. There are two good reasons for this failure. First, the Code does not contain the phrase; and second—to this writer's chagrin after reading every word of the legislative history—the phrase does not appear anywhere in the legislative history.

Why, then, do the courts and commentators find this concept so attractive that they are willing to build their analyses on such chimerical ground? The answer is shockingly simple. Each time the "honest debtor" language appears, it presages a *broad good faith* analysis and a finding of "lack of good faith." Were the "honest debtor" restriction to exist, then it would be possible—or even easy—to limit the benefits of the broad Chapter 13 discharge to debtors deemed "honest." Presumably, "honest debtors" would be those who have not offended the presiding court's moral sensibility.

In the hindsight afforded by the "honest debtor" inquiry, we can understand what drives the *broad good faith* courts. They bridle at the possibility that unworthy debtors might achieve the benefits of Chapter 13. It is the moral status of the debtor (worthy or unworthy, honest or dishonest), not the debtor's objectively observed conduct within the bankruptcy court, that is at issue. Therefore, if the debtor is determined to be a member of the "suspect class" of "dishonest debtors," she can more easily be denied the benefits of bankruptcy protection. The

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193. *See, e.g., In re* Boyd, 57 B.R. 410 (Bankr. N.D. Ill. 1983); *In re* Troyer, 24 B.R. 727 (Bankr. N.D. Ohio 1982).

194. Daniel G. Chadwick, *In re* Prine*: Good Faith, Dischargeability and Conversion From a Chapter 7 to a Chapter 13 Bankruptcy*, 19 IDAHO L. REV. 115, 115 (1983).

"honest debtor" analysis is attractive because it encapsulates the court's implicit moral inquiry.

This is the true pattern of the *broad good faith* cases. The moral inquiry that drives the *broad good faith* courts throws the debtor's history open to scrutiny, even though the Code does not support such an examination. The reason that courts are offended by the attempt to discharge what would be nondischargeable in Chapter 7 is that the debtor seems to be avoiding her just deserts. The idea that the debtor abuses the spirit of the Code by seeking a Chapter 13 discharge follows the same line of reasoning: the debtor seeks to avoid her punishment by the subtle trickery of complying with the statute.[195] For this reason the courts often cannot contain their outrage at the conduct of the debtor or at the facts giving rise to liability.

From the beginning of its deliberations, a *broad good faith* court makes a moral inquiry. As previously noted, what characterizes the *broad good faith* inquiry is the unwillingness to read § 1325(a)(3) literally. Thus, courts have left the realm of law altogether. By focussing on the moral status of the debtor, the courts have stopped interpreting "good faith" in Chapter 13 as a concept in the law rooted in a legal text, and have dropped into the metaphysical world of morality.[196]

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195. Most of the *broad good faith* courts imply by their actions that it is an unfair manipulation of the use of Chapter 13 to discharge liability that the court does not believe should be discharged. A few courts, however, have explicitly stated that compliance with the formalities of Chapter 13 constitutes manipulation of the statute. *See* Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936, 941 (11th Cir. 1986) ("Good faith or basic honesty is the very antithesis of attempting to circumvent a legal obligation through a technicality of the law."); *In re* Davis, 68 B.R. 205, 217 (Bankr. S.D. Ohio 1986) (quoting with approval, *In re* Waldron, 785 F.2d at 941). *See also In re* Carver, 110 B.R. 305, 308 (Bankr. S.D. Ohio 1990), in which the court makes the incredible admission that: "The courts have been guided by subjective, rather than legislative, considerations in defining the 'spirit and purpose' of Chapter 13, even at the expense of the express provisions of the Code."

196. The twentieth century has produced successive waves of schools of textual interpretation. These schools disagree at virtually every point in their *Weltanschauungen*. They would all agree, however, that the critical point in a text is the point at which the text seems to lose control of itself and spiral out of control of its stated intention. Among the leading lights in the field of text studies are the psychiatrist Sigmund Freud, the cultural anthropologist Claude Levi-Strauss and the literary theorist Jacques Derrida. Freud identified the critical point as follows:

> There is often a passage in even the most thoroughly interpreted dream which has to be left obscure. . . . [A]t that point there is a tangle of dream-thoughts which cannot be unraveled and which moreover adds nothing to our knowledge of the content of the dream. This is the dream's navel, the spot where it reaches down into the unknown. The dream-thoughts . . . cannot . . . have any definite endings; they are bound to branch out in every direction into the intricate network of our world of thought.

Not only is the language of the courts moral, but so is their very orientation. When the courts eschew an examination of objective behavior and focus instead on internal, unknowable motivation, they abandon the mandate of the law.

The distinction between law and moral inquiry is complex, but may be simply summarized. H.L.A. Hart presents the traditional distinction between law and morality as follows:

> The most famous attempt to convey in summary fashion their essential difference is the theory which asserts that, while legal rules only require 'external' behavior and are indifferent to the motives, intentions, or other 'internal' accompaniments of conduct, morals on the other hand do not require

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5 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 525 (James Strachey ed., 1959). Levi-Strauss, describing the "key myth" upon which to base his structural analysis of myth, stated, "the key myth is interesting not because it is typical, but rather because of its irregular position within the group. It so happens that this particular myth raises problems of interpretation that are especially likely to stimulate reflection." 1 CLAUDE LEVI-STRAUSS, INTRODUCTION TO A SCIENCE OF MYTHOLOGY: THE RAW AND THE COOKED 2 (John & Doreen Weightman trans., Harper & Row 1969). Derrida used "metaphor" as an example of a site at which a text unravels:

> Since it marks the movement or the detour in which sense [meaning] may seem to launch out by itself, unloosed from the very object to which it nevertheless is pointed, from the truth which brings it into harmony with its referent, metaphor may set off an errant semantics. The sense of a noun, instead of designating the thing which the noun should normally designate, goes elsewhere.

Jacques Derrida, *White Mythology: Metaphor in the Text of Philosophy*, 6 NEW LITERARY HISTORY 5, 41 (1974). It appears that the precedential authority cited in a legal opinion functions the same way as a metaphor, by opening the text to the extra-textual. For Freud, Levi-Strauss, Derrida, and all of the text scientists, these *caesurae* are the point at which a text reveals its true self.

Text science by any name (structuralism, deconstruction, grammatology, or anthropoetics) has earned a deservedly bad reputation in legal studies. As a result, it would not be proper to insist too strenuously that the Code and the cases interpreting it are one "text," nor that "good faith" "deconstructs" the Bankruptcy Code. Yet the similarity between the holes in the texts of which Freud, Levi-Strauss and Derrida speak, and the hole punched by the *broad good faith* courts is suggestive. Even the most traditional of readers must admit that some of the "good faith" cases reach conclusions which, by studying the statute, are unpredictable. Because these cases are unpredictable, they pierce a hole in the Code, introducing unpredictability and incoherence into a text which was designed to enhance predictability and establish authority. Are the "good faith" cases the umbilicus which reveals the Code's own true self? Regrettably, this inquiry must await a subsequent opportunity for further discussion.

> any specific external actions but only a good will or proper intentions or motive. [197]

Law focuses primarily on conduct, and secondarily on motivation. Morality places primary weight on motivation, and secondary weight on objective conduct.

This dichotomy is crystal clear in two major Western religious systems. In Judaism, a moral and a legal system coexist in the two parts of the *halachah*.[198] One part of the *halachah* may be called law; it concerns objective conduct. The other part might be called moral. The Yom Kippur[199] liturgy reflects this latter portion. On Yom Kippur, Jews atone not only for intentional and knowing transgressions of Jewish law, but also, "[f]or the sin which [they] have sinned . . . without knowledge; [and] . . . for the sin that [they] have sinned . . . through confusion of the heart."[200] These phrases imply that the objective conduct may be set aside, so that the penitent can be judged on his intention. The theme can also be found throughout the Talmud: "R[abbi] Nahman bar Issac said: A transgression performed with a good motive is better than a precept [*mitzvah* or commandment] performed for an ulterior motive."[201] Moreover, "[t]he one who performs numerous precepts and the one who performs only a few have equal merit,

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197. H.L.A. HART, THE CONCEPT OF LAW 168 (1st ed., 1961). Of course, Professor Hart only cites this summary distinction in order to destroy it. Professor Hart claims that the distinction is erroneous; he proceeds to derive four "cardinal related features" which point out the true distinctions. *Id.* at 169-176. Hart's real objection to the general distinction quoted here is apparently that it fails to acknowledge that law, too, is concerned with motivation. In this observation, he is obviously correct; nonetheless, this objection does not completely invalidate the distinction quoted. I would like to believe that Professor Hart would agree with me that law is concerned *primarily* with objective conduct and only secondarily with intention, whereas morality reverses the level of priority.

198. Halachah generally means, "The Way," and refers to the combined sources of Jewish Law. The code of Jewish law includes commandments from the Bible, as well as legal rulings from the Mishna (a first compendium of rabbinic interpretations and amplifications of the law) and the Talmud (a second compendium). *Halachah* also includes contemporary and current rulings and interpretations, more or less through present day. *See* RABBI HAYIM HALEVY DONIN, TO BE A JEW 29 (1972).

199. "Yom Kippur" is the "Day of Atonement," in which Jews confess their transgressions to God and request forgiveness. One can seek only divine forgiveness on Yom Kippur; any transgressions against one's fellows must be addressed separately. The quoted portion of the liturgy, *infra* note 200, at 360-361, and accompanying text, highlights the similarity of the focus on *intention* in a context in which the standard of behavior is moral more than it is ethical (i.e., relating to the relationships with God rather than the relationship between persons).

200. THE COMPLETE ARTSCROLL MACHZOR: YOM KIPPUR 360, 361 (1992).

201. *Babylonian Talmud*, Tractate Nazir 23b, *quoted in* THE BOOK OF LEGENDS 460 (William G. Braude trans., Hayim Nahman Bialik & Yehoshua Hana Ravnitzky eds., 1992).

provided the heart is directed toward Heaven."[202] Thus, in this moral system, internal and subjective intention is of primary concern, while compliance with the law is of secondary importance.

The pre-eminence of internal motivation over external, objective actions is even more clear in Christianity. This clarity arises, in part, out of Christianity's historical dismissal of Jewish law. This pre-eminence is also presented starkly in the New Testament through its insistence that observance of the law is insufficient: "Woe unto you, scribes and Pharisees, hypocrites! For ye pay tithe of mint and anise and cumin, and have omitted the weightier matters of the law, judgment, mercy and faith: these ought ye to have done, and not to leave the other undone."[203] The internal motivations matter in this moral system, as the following passages illustrate: "Thou blind Pharisee, cleanse first that which is within the cup and platter, that the outside of them may be clean also. . ."[204] "Even so ye also outwardly appear righteous unto men, but within ye are full of hypocrisy and iniquity."[205] Again, motivation is the primary concern, while conduct is only secondary. The foregoing complaints indict technical observance of the law as sly attempts to avoid moral judgment.

B. The Power of the Court of Equity

The moral inquiry undertaken by the *broad good faith* courts is not completely without precedent in common law jurisprudence. Bankruptcy courts—particularly the *broad good faith* courts—are fond of justifying their expansive inquiry with the broad powers that can be executed by a court of equity. Although bankruptcy evolved from the law merchant,[206] there is no doubt that it arrived in the common law as a creature of equity. The Chancery courts maintained original jurisdiction over statutory bankruptcy in England.[207] The receivership in equity

202. *Babylonian Talmud*, Tractate Berachot 5b, *quoted in* THE BOOK OF LEGENDS 460 (William G. Braude trans., Hayim Nahman Bialik & Yehoshua Hana Ravnitzky eds., 1992).
203. *Matthew* 23:25.
204. *Id.*
205. *Matthew* 23:28.
206. H.R. DOC. NO. 93-137, pt. 1, at 63 (1973).
207. 1 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 470-478 (A.L. Goodhart et al. eds., 4th ed., 1956).

approximated bankruptcy protection (at least for the creditors) before the advent of comprehensive bankruptcy codes.[208]

Equity and equitable remedies carry a heavy load of historical baggage. One legacy is a certain informality, an unwillingness either to state or to be bound by "elements" of a cause of action: "[T]he substantive rules of equity were made in response either to unduly rigid legal rules, or to their entire inadequacy . . . In the equity court it did not matter whether the facts fitted some established form; relief would be given on the chancellor's sense of need and justice."[209] Another legacy is the centrality of the judge and the reliance on the judge's idiosyncratic decision: "[R]elief would be given on the chancellor's sense of need and justice . . . . He decided the case himself, and he compelled what the law courts would not even permit—the testimony of the actual parties."[210] The chancellor's remedies were also more powerful than those of his colleagues in the law courts,[211] making him even more central in the system than a judge in a court of law.

A final legacy looms quite large for present considerations. The equity system was not defined just by what it was not—*not* formal, *not* legal—but also by its peculiar focus. The kernel of a chancery question was moral. Equity courts use rules and equitable maxims,[212] but "in each case the substantive rules were purportedly based on higher moral principle."[213] A chancery court might consider the petitioner's "clean hands," and "unclean hands may be any sort of conduct that equity considers unethical, even if that conduct is perfectly legal."[214]

Thus, equity can be characterized as informal, idiosyncratic, and moral. It is certainly not surprising that an area of law descended from equity might contain traces of these elements. Nor is it particularly

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208. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 24 (1973).
209. *Id.* at 25.
210. *Id.*
211. Professor Dobbs categorizes these remedies as coercive, restitutionary and declaratory. *Id.* It is interesting to consider how much of the modern practice of law relies on equitable remedies. In the author's experience, little civil litigation proceeds without the use of equitable remedies such as injunction and restitution; equally common is the use of measures of "good faith," or "clean hands." Perhaps the fusion of Law and Equity was a merger, but it often seems much more like a hostile takeover, with Law being the losing party.
212. A few of the maxims are cited by Professor Dobbs. *Id.* at 44 n.24, 45 n.24. For the purpose of this article's analysis, some of the more interesting maxims are: "He who comes into equity must come with clean hands; . . . Equitable remedies are given as a matter of grace or discretion, not of right; . . . Equity acts in personam, not in rem." *Id.* (citing G. KEETON, INTRODUCTION TO EQUITY 116 (5th ed. 1961)).
213. *Id.* at 25.
214. *Id.* at 46.

surprising that an equity court's analysis should take on a moral dimension.

A moral dimension, however, differs from a moral inquiry. The moral inquiry undertaken by the *broad good faith* courts conflicts strongly with the purposes of both a system of law and a code of law. This conflict is never more evident than when we examine the purpose of commercial law and the function of the Code.

C. Predictability and the Code

We have examined rather exhaustively one area of the commercial law: Bankruptcy's Chapter 13. To further understand the problem of moral inquiry in bankruptcy courts, it is necessary to examine the purpose of commercial law and the function of a code.

A principal requirement for an efficient system of commerce is predictability. Merchants who are distant from one another must be able to predict each other's present and future conduct. For that reason, cases in commercial law are replete with allusion to certainty as "a prime objective,"[215] an "overriding consideration,"[216] or at least as a matter of high importance.[217] Certainty has been a matter of cardinal importance in commercial law since the founding of the republic.[218] The objective of the commercial code was to unify the commercial law to further promote certainty and predictability.[219]

Certainty is of equal concern in the Bankruptcy Code. The Code's provisions choreograph a complex dance of debtor, creditor and court, each of whom must know what to expect of the other dancers in the

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215. Lakeside Bride & Steel Co. v. Mountain State Constr. Co. Inc., 445 U.S. 907, 911 (1980) (J. White) (commenting on "commercial relations in which certainty of result is a prime objective").

216. Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697, 698, 699 (1963) (J. Harlan, concurring) (noting that "[c]ertainty in the law governing commercial transactions . . . is an overriding consideration . . . .").

217. Hughes v. Fetter, 341 U.S. 609, 615 (1951) (J. Frankfurter, dissenting) (commenting on "the field of commercial law—where certainty is of high importance").

218. Sony Corp. of America v. Bank One, 85 F.3d 131, 145 (4th Cir. 1996) (stating, in the dissent, which is an excellent discussion of certainty in commercial law, that "[t]he cardinal principle of certainty has been the same in commercial law for more than 200 years.").

219. FSLIC v. Kralj, 968 F.2d 500, 508 (5th Cir. 1992); Federal Ins. Co. v. NCNB Nat. Bank of N.C., 958 F.2d 1544, 1551 (11th Cir. 1992) ("[T]he UCC has the objective of promoting certainty and predictability in commercial transactions.").

future. Bankruptcy courts insist that "certainty and finality" are goals of the Code.[220] One case characterizes bankruptcy as an area in which the need for certainty is "particularly acute."[221] Of course, given their mutual parent, the law merchant, it is not surprising that commercial law and bankruptcy share this objective. Nor is the primacy of certainty and predictability limited to commercial law. One opinion emphasized that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[222]

Bankruptcy and commercial law share another characteristic: their means for achieving predictability. In bankruptcy law, predictability is accomplished primarily through formal codification. The purpose of a codification is the promotion of both uniformity and certainty.[223] Whether the "Codes" appearing in American law are "true" codes, is a subject of some academic debate.[224] However, the Bankruptcy Code certainly fits the definition of code as a compendium of law, "devising and shaping 'a coherent body of new or renovated rules' within a whole aimed at 'instituting or reviewing a legal order.'"[225] Two American

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220. Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 388 (1993) (citing "the Bankruptcy Code's goals of certainty and finality"); Allred v. Kennerley (*In re* Kennerley), 995 F.2d 145, 148 (9th Cir. 1993) (speaking of "the need for certainty in determining which claims are and are not discharged"); Nelson Co. v. Counsel for the Official Comm. of Unsecured Creditors (*In re* Nelson Co.) 959 F.2d 1260, 1266 (3rd. Cir. 1992) (noting certainty as one driving force in its decision).

221. *In re* Penn Central Transp. Co., 944 F.2d 164, 166, 167 (3rd Cir. 1991) (beginning its analysis with the "proposition that in the context of bankruptcy 'the need for finality and certainty is especially acute.'" (quoting Taylor v. Freeland & Kronz, 938 F.2d 420, 425 (3d Cir. 1991) (citing Chrysler Motors Corp. v. Schneiderman, 940 F.2d 911, 914 (3d Cir. 1991))).

222. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). *See* also Hubbard v. United States, 514 U.S. 695, 1767 (1995) (Rhenquist, C.J., dissenting).

223. *See* Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1073 (1988) ("A code is . . . characterized by two fundamental functions: it gathers together written rules of law and it regulates different fields of law.").

224. Professor Bergel distinguishes between "true" or substantive codifications and "merely formal" codifications. *Id.* at 1076, 1077. Not surprisingly, this professor from the Universite de Droite, d'Economie et des Sciences d'Aix'Marseille III, finds that French codes are true codes and the American codes are not. On the one hand, he is undoubtedly right that "codes" such as the Texas Civil Practice & Remedies Code or the Georgia Civil Code "strive[ ] only to succeed in regrouping and classifying existing texts." *Id.* at 1097. On the other hand, the purposes of the Bankruptcy and Commercial Codes meet the "main goal of substantive or true codification[:] to achieve a material and systemic structure of the law". *Id.*

225. *Id.* at 1077 (citing 1 G. CORNU, DROIT CIVIL, INTRODUCTION—LES PERSONNES—LES BIENS, no. 222 (2nd ed. 1985)). Professor Bergel's objection to the common law codes seems to be two-folded. First, that they were not animated by a "political and ideological impulse," are not therefore "the elaboration of a particular spirit," and thus cannot be true codes. *Id.* at 1077-1078. One wonders how any code *not* animated by a French emperor could meet this objection. Second, he objects that

scholars explain the rationale behind codification: "[I]f the law is put into a code (a well drafted one, of course) then its generally precise text will greatly reduce uncertainty, enhance predictability, and diminish the volume of legal disputes."[226] In essence, these writers argue that the code must be *authoritative*. While this statement specifically referred to the drafting of the Uniform Commercial Code, it could apply equally to the creation of the Bankruptcy Code.[227]

Scholars appear to agree uniformly that the purpose of a code is to ensure predictability. The writers on codes and codification agree that much of the focus is on the *layman's* ability to predict the outcome of his actions.

> [T]he primary function of the codes . . . is not to guide the resolution of disputed cases by the courts, but to guide the daily life of honest citizens—to provide the rules on which the citizen can safely rely in the conduct of his affairs, whether in his family, or his place of employment or business, or in his relations with neighbors. It is precisely in performing this function that the general principles, standards rules and concepts of the code, can, despite Justice *Holmes*, "decide" a vast number of "concrete cases" in the sense of indicating what the citizen needs to do.[228]

Put more succinctly, a code should provide "an organized system of general rules which will be easy to discover so that from these rules,

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the common law codes do not attempt a codification of the entire body of civil law, but instead tend to be confined either to particular substantive areas or to "strive[ ] merely to . . . regroup and reclassify" existing statutes. *Id.* at 1097. This objection receives further support in Dennis Tallon, *Civil and Commercial Law*, *in* 8 INT'L ENCYCLOPEDIA OF COMP. L. 47-56 (Konrad Zweigert ed., 1983). My colleagues from Code countries share this view of a code as an all-encompassing umbrella and, therefore, find codes such as the Bankruptcy Code to be curiously limited.

226. JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 20 (2d ed. 1980).

227. There are obviously differences between the circumstances which led to the creation of the Bankruptcy Code and the Uniform Commercial Code. The UCC had to unify a field in which each state had already established a corpus of existing law. The Bankruptcy Code essentially defined its field and then preempted any competitor (with assistance from the Constitution and Congress). Nevertheless, it can hardly be doubted that Professors White and Summers voice the intentions that animated not just the drafters of the Uniform Commercial Code, but also the Bankruptcy Code and its predecessors.

228. Geoffrey Sawyer, *The Western Conception of Law*, *in* 2 INT'L ENCYLOPEDIA OF COMP. L. 32 (René David ed., 1983) (emphasis in original). The phrase "honest citizen" is both inexplicable and tantalizing. It is inexplicable because even Napoleonic Code countries have laws which govern the actions of the dishonest citizens. A civil code should therefore cover both. It is tantalizing in light of the discussion in the text of the parthenogenesis of the term "honest debtor."

through an easy process, judges and citizens may deduce the manner in which this or that practical difficulty must be solved."[229]

In what sense do the *broad good faith* courts fulfill the twin necessities of authority and predictability? When the courts ignore the plain meaning of the Bankruptcy Code, they make the Code unreliable because the statutory words no longer mean what they appear to mean. Through idiosyncratic and unpredictable interpretations of Code language, *broad good faith* courts make the Code unpredictable as well. Even the courts complain about the confusion of opinions on "good faith."[230] How well are these courts—the majority of Chapter 13 courts—serving the Code and the law?

V. GOOD FAITH, BAD LAW

The author believes that the primary problem with the *broad good faith* analysis is that it imports a moral inquiry into the Bankruptcy Code. This article, however, should not be read to criticize any moral or religious view. The author does not intend to denigrate either of the moral systems previously mentioned. Nor does the author mean to encourage the reprehensible view that personal morality and the practice of law are separate disciplines, or that ethics is merely a course taught in law school. To the contrary, the author believes that a person cannot properly practice law without a strong sense of personal morality informing her actions.

Moral and legal systems, nevertheless, have differing methodologies and differing ends. Law and morality may be related—we are best advised to leave the exact definition of that relationship to moral scholars—but they are distinctly separate.[231] For this reason, the

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229. Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. at 1081 (1988).

230. *In re* Heard, 6 B.R. 876 (Bankr. W.D. Ken. 1980) (noting a confusion of opinions); *In re* Jones, 119 B.R. 996 (Bankr. N.D. Ind. 1990) (noting an infinity of opinions); Public Fin. Corp. v. Freeman, 712 F.2d 219 (5th Cir. 1983) (referring to the issue as "unsettled").

231. One further example demonstrates how distinct law and morality are as systems. As discussed *supra*, notes 196-205 and accompanying text, moral systems focus on intention. In law, intention is an element of many causes of action. However, two points must be observed: First, in both criminal and civil contexts, the malfeasor is judged principally upon his objectively determinable conduct. Perhaps this is because intent may be inferred but is objectively unknowable, whereas conduct can be proven. Second, even where intention or *scienter* is an element of a cause of action, it can only be proven by inference or indirect evidence. Many jury instructions on intention explicitly permit the jury to infer that "a person intends the natural and probable consequences" of his actions because intent can never be directly known. 1 EDWARD D. DEVITT, ET AL., FEDERAL JURY PRACTICE INSTRUCTIONS § 17.07 (4th ed. 1992). In a

importation of external inquiries into an objective legal system creates an insupportable tension that disrupts and distorts the law.

The disruption manifests itself in several ways. The principal result of the tension is that the interpretation of the statute, as read by the majority of courts, becomes unpredictable, and therefore less than authoritative. However, there are other problems. The *broad good faith* courts, in re-writing the statute, violate the Constitutional separation of powers. Moreover, in undertaking a moral analysis, the courts often adopt informal procedures which threaten due process. The *broad good faith* movement creates a class of "bad debtors" who are *a priori* presumed undeserving of Code protection, irrespective of what is stated in the statute. Although there is insufficient space to examine these problems in detail, a few words should be said about each.

The author previously noted the importance of predictability in commercial law and in bankruptcy law in particular. The importation of the moral inquiry into the Bankruptcy Code makes the outcome of the "good faith" analysis unpredictable in practice. A debtor must guess what a court will do, given his particular jurisdiction and a particular judge. If the debtor has the misfortune of being assigned to a *broad good faith* court, the debtor is unable to anticipate how the bankruptcy judge will view the debtor and her particular history. The same conduct which will constitute good faith in one court will cause a plan to be denied for "bad faith" in another. Because the *broad good faith* cases recognize no anchoring text or principle, the Code and the cases provide almost no practical guidance as to what might occur once the debtor files his petition in Chapter 13.[232] For debtors concerned with their own

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moral system, either the standards of conduct are metaphysical or the Judge is perfect and omniscient. In either case, intent is presumed to be knowable. Moral judgements about a person's character tend to be absolute ("dishonest," "impenitent," etc.), as though these judgements reach beyond conduct, delving into a person's true essence. Moreover, in a moral system, the standards of evidence tend to be informal (one assumes that the Judge can, in fact, hear inadmissible evidence and still set it aside while coming to a judgment) because the Judge is omniscient. Interestingly, this informality of procedure is picked up by the *broad good faith* courts, although presumably the bankruptcy court judges claim somewhat less perfection than their omnipotent Colleague. Thus, a confusion over which system empowers a judge could easily result in either the judgement of a person's moral essence rather than their conduct, or in a willingness to rely on less formal procedures once the moral truth is deemed "obvious," rather than rely on statutory authority.

232. Pity the poor bankruptcy lawyer who has to represent a debtor with a checkered past! Not only does the practitioner have conflicting ethical duties to the

immediate problems, the problem of unpredictability looms even larger than the jurisprudential problems that will subsequently be discussed. For debtors, the consumers and beneficiaries of the Code, the greatest concern is the practical and immediate question: How will I be treated? However, the concern about predictability is not merely parochial. It concerns all legal systems and all cultures:

> At the root of everyday life in any society there must necessarily be some patterns of habitual conduct followed by the members, providing a basis upon which one member will be able to predict how another is likely to behave under given circumstances and how his own actions will be received.[233]

Certainty and predictability must be the essence of a legal system. Yet a debtor in a Chapter 13 can have little certainty about how a court will behave or how her own actions will be received.

There are jurisprudential problems which must also be noted. First, consider the question of the courts rewriting the statute. The statute states that "good faith" relates to proposal of a plan; the *broad good faith* courts ignore this directive. A few courts point out that a *broad good faith* reading infringes on Congressional prerogatives.[234] This writer could find no response by the *broad good faith* courts to that charge. But it is not a criticism to be ignored. When the courts re-write legislation, they violate the separation of powers, which is a principal foundation of our constitutional system. The recognition that courts could interpret but not rewrite statutes primarily dawned with *Marbury v. Madison*.[235] In that case, Chief Justice Marshall determined that the courts should not entertain political questions.[236] There has been great debate over what constitutes a political questions, but there is little debate over the proposition that political questions include all matters on which Congress has spoken constitutionally.[237] The *broad good faith* courts showcase the danger inherent in judicial encroachment. The courts' re-writing of the statute to avoid ends they abhor may seem harmless when the imported values are moral. Yet, if courts can give themselves moral license to ignore the plain meaning of a statute, what prevents them from similarly licensing themselves to import terms

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estate and to the client, but she cannot predict which factors the court will use to judge the plan she has assisted the client in drafting. Must the lawyer notify her malpractice carrier each time she files a Chapter 13 plan?

233. SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 25 (1979).

234. *See* discussion *supra* notes 94, 95.

235. 5 U.S. (1 Cranch) 137 (1803).

236. *Id.*

237. *See* CHARLES ALLEN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 14 (3d ed. 1976).

contrary to the Constitution, or contrary to the common law tradition, or contrary to democratic values?[238]

Most of the courts remain ignorant of the problem or ignore it. Some opinions, however, clarify that in rewriting the statute, the *broad good faith* courts ignore the clear signals of the Supreme Court[239] and usurp legislative prerogative.[240] One court cautions: "Without some definition, an exercise of discretion could be arbitrary and an abuse."[241] Occasionally, the *broad good faith* courts recognize the limits as they trample them, as exemplified by the following passage: "The courts have been guided by subjective, rather than legislative, considerations in defining the 'spirit and purpose' of Chapter 13, even at the expense of the express provisions of the Code."[242] Chillingly, many courts are shameless in announcing their intent to ignore the plain words of the statute: "A statute should not be applied strictly in accord with its literal

238. This must be acknowledged as a particularly painful epiphany to those of us who grew up cheering the aggressive activism of the Warren Court. The Warren Court seemed to seek out injustice and strike it down, acting heroically in areas in which the legislature seemed incapable of acting. The decisions of the *broad good faith* courts illustrate why judicial activism creates systemic legal problems. When courts have no anchor to restrain them, they may act in unpredictable and ultimately destructive ways. The results of judicial activism may fit our own individual agendas. These results, however, may also undermine our agendas in two different ways. First, the judicial activists may serve an agenda contrary to our own. Second, and more importantly, judicial activism weakens the judicial system by subjecting the law to the kinds of pressures which bend and tear the fabric of the law. The damage done to the legal system as a whole may be catastrophic when courts refuse to recognize any external standard (e.g., a statute or the Constitution) to anchor their decisions. What would happen, for example, if a majority of courts adopted the "God's law over man's law" argument advanced in some areas of heated cultural debate? If courts may ignore or distort legal principles which result in (for them) unconscionable ends, then what predictability and what principles would long survive?

239. *See* cases cited *supra* note 95. Query: if the Supreme Court is not supreme, what is it?

240. The Supreme Court, presumably the ultimate judicial branch arbiter of the issue, clearly considers this to be legislative prerogative. *See, e.g.* Taylor v. Freeland & Kronz, 503 U.S. 638, 644, 645 (1992) (declining to read into a section of the Code provisions to limit bad faith claims, and stating: "To the extent that [the Code sections] do not [provide the necessary limitations], Congress may enact comparable provisions to address the difficulties that [the creditor] predicts will follow our decision. We have no authority to limit the application [of the statute.]"). *See also* cases cited *supra* note 95.

241. *In re* Farley, 114 B.R. 711, 713 (Bankr. S.D. Cal. 1990).

242. *In re* Carver, 110 B.R. 305, 308 (Bankr. S.D. Ohio, 1990).

meaning where to do so would pervert its manifest meaning."[243] It is difficult to view this statement as justification for anything less than the "arbitrary" and "abusive" actions warned of above.[244]

A related jurisprudential problem with the *broad good faith* courts is that when they import the moral elements of the equitable inquiry, they seem also to import the informal procedures of the old courts of equity. In *Neufeld v. Freeman*, for example, the Fourth Circuit based its "lack of good faith" holding on nondischargeability.[245] This was not a nondischargeability determination that had been adjudicated by a court: the claims were only "arguably . . . render[ed] . . . nondischargeable in a Chapter 7 case."[246] The court, nevertheless, stated that no formal finding ever needed to be made:

> Of course the issue of dischargeability in Chapter 7 need not, and cannot, be litigated to conclusion in every Chapter 13 confirmation proceeding. Where significant claims involve conduct that would otherwise raise serious Chapter 7 dischargeability issues, however, the quality of that conduct is part of the "totality of circumstances" which must be weighed, with other factors, in assessing the debtor's good faith under chapter 13.[247]

Nor did the burden of proof need to be as high as it would need to be elsewhere:

> If the court discovers unmistakable manifestations of bad faith . . . confirmation must be denied. Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.[248]

Thus a debtor's conduct may be determined nondischargeable without an opportunity for the kind of hearing to which, were she in Chapter 7, she would be entitled. Moreover, this determination may be made on minimal proof, insufficient to support an actual finding. This is the kind of informal procedure which the old courts of equity might condone; in American jurisprudence, this informality treads close to a denial of due process.

The reader may dismiss these concerns as mere glitches in a complex system that requires a little fine-tuning. We may wish to trust the system of justice not to allow the courts to wander too far astray.

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243. *In re* Adamo, 619 F.2d 216, 222 (2nd Cir. 1980), *cert. denied sub nom.* Williams v. New York Higher Educ. Services, 449 U.S. 843 (1980); *see also In re* Meltzer, 11 B.R. 624, 627 (Bankr. E.D. N.Y. 1981) (citing *In re* Adamo with approval).
244. *See* discussion *supra* notes 237-239 and accompanying text.
245. 794 F.2d 149 (4th Cir. 1986).
246. *Id.* at 151.
247. *Id.* at 153.
248. *Id.*

Perhaps the problems of the violation of separation of powers and denial of due process are minor issues, small monsters to be dealt with when they have grown larger and more imminent. For one particular group of debtors, however, the problems associated with the *broad good faith* inquiry are huge and present. This is the undefined class who will be found to be "undeserving" of the discharge offered by Chapter 13. The *broad good faith* analysis threatens to create a class of disfavored debtors whose experience in bankruptcy court is more likely to be unpleasant than other debtors in similar economic situations. Courts are creating a class of bad debtors who do not "deserve" bankruptcy protection, by labeling them "dishonest debtors" or merely "undeserving." This has to be of concern to any debtor with a blemished pre-bankruptcy history. Professionals who seek protection in bankruptcy should be particularly concerned. If the *broad good faith* courts are going to judge any debtor harshly, who better deserves their wrath than the professional who seeks to discharge malpractice liability by invoking the protection of Chapter 13? After all, these are debtors whom the bankruptcy courts have already been treating with increased scrutiny,[249] and who may choose Chapter 13 to discharge what would not be dischargeable in Chapter 7. To the problems of unpredictability, separation of powers, denial of due process, add fairness: Is it fair for courts to create a suspect class of debtors without statutory or legislative authority?

This article does not argue that the *broad good faith* courts err in their concerns about the proper qualifications for a Chapter 13 action. One may reasonably argue that professionals do not deserve protection in bankruptcy. The issue of the discharge of nondischargeable debts can also be debated. The use of the Code by "dishonest debtors" certainly needs to be debated and must be resolved. These are legitimate concerns of educated, intelligent and well meaning jurists. These concerns should be aired and debated, both in academic journals and in Congress.

The problem with the *broad good faith* courts is not their concern but their conduct. These courts should consider the likely results of their actions. A law that is unpredictable will be ignored. Courts and commentators already complain about the number of unacceptable plans presented. But who can determine what the rule is when every court has

249. *See* Elbein, *supra* note 3.

its own? Moreover, the proper advice to a debtor with a questionable past may be to file under Chapter 7 in order to avoid the unpredictable results of the good faith analysis. The ultimate burden of the unpredictability will thus be borne by the creditors, who by definition would receive less under Chapter 7 than under Chapter 13[250] and would, therefore, be burdened by additional Chapter 7 filings.

The effects of the unpredictability inherent in the *broad good faith* analysis may reach far beyond Chapter 13. This unbounded analysis threatens to tear the text of the Bankruptcy Code open to the personal interpretation of an individual judge who recognizes no limits on his interpretative discretion. The hole in the Code, having been worked open, may fray and tear with the interjection of the courts' idiosyncratic interpretations until "good faith" truly means nothing. It is not unreasonable to believe that this cancer could easily spread to Chapter 11's "good faith" requirement (if it is not already working there in the guise of a "good faith filing requirement"). Nor is there any reason to believe that this approach must be limited to the bounds of the Code. If bankruptcy courts can ignore both the clear words of the statute and the mandate of the Supreme Court, then why not ignore the troublesome wording of banking statutes, or the criminal law, or even amendments to the Constitution? What body of law can survive the reinterpretation of its major provisions in ways not restrained by anything beyond the courts' own idiosyncratic values? Whatever meaning Congress intended for "good faith," Congress surely did not intend to license an undermining of the authority of the Bankruptcy Code.

Courts may legitimately concern themselves with morality and law. In doing so, however, they should remember the injunction of the greatest proponent and expositor of the moral law. Immanuel Kant derived the following supreme principle for ethical conduct: "Act on a maxim the *ends* of which are such as it might be a universal law for everyone to have."[251] That is: Act in ways which, if adopted by all of society, would cause no societal harm; avoid acting in ways which, if adopted by all, would damage society.

In examining "good faith" in Chapter 13, we have seen the results of defying Kant's categorical imperative. When courts fail to recognize the plain meaning of a statute as a restraint, and instead rely on their own

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250. This is the "definition" of § 1325(a)(4), which requires that the creditor receive "not less than the amount that would be paid . . . under chapter 7." 11 U.S.C. § 1325(a)(4) (1994).

251. Immanuel Kant, *Preface and Introduction to the Metaphysics of Ethics* (Thomas Kingsmill Abbott trans.), *in* 42 GREAT BOOKS OF THE WESTERN WORLD 373 (Robert Maynard Hutchinson et al. eds., 1952).

moral values, they render the Code unpredictable and undermine its authority. However, the damage is not irreparable. Courts can act in a manner which "might become a universal law," the manner that is required by our legal system. Bankruptcy courts must recognize the plain meaning of the Code as a restraint on their good faith activism. Only in this manner, can these courts repair the hole already worn into the integrity of the Code, providing much needed certainty, equality, and predictability.